85-931

DOCKET NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JAMES HENRY KIRKLEY,

Petitioner

Versus

STATE OF LOUISIANA

Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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QUESTIONS PRESENTED FOR REVIEW

I. Whether or not a defendant, arrested pursuant to a warrant, and subjected to a preindictment line up conducted at least in part by the Office of the District Attorney was entitled to counsel, where the District Attorney considering the line up a "critical stage" of the proceeding, arranged for a representative (non-lawyer) of the Public Defender's Office to be present at the line up, but then ejected the representative from same prior to the identification.

II. Whether or not a line up before indictment, at least partially conducted and controlled by the prosecutor is an adversary process or a critical stage of the proceeding.

III. Whether or not the statutory scheme by which the defendant was convicted is unconstitutionally vague, violating the 5th and 14th Amendments of the United States Constitution, where a jury is presented with two statutes and can choose what statute was violated, but were the act alleged to have occurred fit the definition of either statute, one providing a more severe penalty.

LIST OF PARTIES

JAMES HENRY KIRKLEY ..... Petitioner

STATE OF LOUISIANA

HON. WILLIAM GUSTE
Attorney General
State of Louisiana

HON. BRYAN BUSH
District Attorney
19th Judicial District Court

DENNIS WEBER, ESQ.
Assistant District Attorney
19th Judicial District Court

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

OPINIONS BELOW 1

GROUNDS FOR JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 7

REASONS FOR ALLOWANCE OF THE WRIT 9

I. The Line Up Procedure 9

II. Statutory Vagueness 12

CONCLUSION 18

APPENDIX A 1-A

APPENDIX B 1-B

APPENDIX C 1-C

APPENDIX D 1-D

APPENDIX E 1-E

APPENDIX F 1-F

APPENDIX G 1-G

APPENDIX H 1-H

APPENDIX I 1-I

APPENDIX J 1-J

TABLE OF AUTHORITIES

United States Constitution

Amendment V 2

Amendment VI 3

Amendment XIV 3

Page

Louisiana Constitution

Article 1, Section 13 .....3, 10

Louisiana Statutory and Codal Authorities

LSA-R.S. 14:41 4

LSA-R.S. 14:42 .....4, 12

LSA-R.S. 14:42.1 .....5, 12

Code of Criminal Procedure, Art. 230 .....5, 10

Code of Criminal Procedure, Art. 814 5

Code of Criminal Procedure, Art. 859 .....6, 13

UNITED STATES SUPREME COURT OPINIONS

Betts vs. Brady, 316 U.S. 455, 86 L.Ed. 1595, 62 S.C. 1252 15

Brewer vs. Williams, 430 U.S. 387, 51 L.Ed. 2d 424, 92 S.Ct. 1232 (1977) 10

Connally vs. General Construction Company, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926) 15

Foster vs. California, 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127 (1969) 12

Gilbert vs. California, 388 U.S. 263, 18 L.Ed. 2nd 1178, 87 S.Ct. 1951 (1967) 9

Grayned vs. City of Rockford, 408 U.S. 104, 33 L.Ed. 2nd 222, 92 S.Ct. 2294 15

Griffin vs. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 15

Kirby vs. Illinois, 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972) 9, 11

Lanzetta vs. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939) 15

Page

Massey vs. Moore, 348 U.S. 105, 99 L.Ed. 135,
75 S.Ct. 145 15

Moore vs. Illinois, 434 U.S. 220, 54 L.Ed. 2d 424,
98 S.Ct. 458 (1977) 10, 11, 12

Norell vs. Illinois, 373 U.S. 420, 10 L.Ed. 2d 456,
83 S.Ct. 1356 (1963) 15

Palmer vs. City of Euclid, 402 U.S. 544, 91 S.Ct. 1563,
29 L.Ed. 2d 98 (1971) 16

Powell vs. Alabama, 287 U.S. 45, 53 S.Ct. 55,
77 L.Ed. 158 (1932) 15

Rochia vs. California, 342 U.S. 165, 96 L.Ed. 183,
72 S.Ct. 205 (1951) 15

Stovall vs. Denno, 388 U.S. 293, 18 L.Ed. 2d 1199,
87 S.Ct. 1967 11

United States vs. Ash, 413 U.S. 300, 37 L.Ed. 2d 619,
93 S.Ct. 2568 (1973) 12

United States vs. Gouveia, 81 L.Ed. 2d 146,
104 S.Ct. 2292 (1984) 10

United States vs. Harris, 347 U.S. 612, 74 S.Ct. 808,
98 L.Ed. 989 (1954) 17

United States vs. Wade, 388 U.S. 218, 18 L.Ed. 2d 1149,
87 S.Ct. 1926 (1967) 9

Williams vs. Illinois, 399 U.S. 235, 26 L.Ed. 2nd 586,
90 S.Ct. 2018 (1970) 15

Winters vs. New York, 333 U.S. 507, 678 S.Ct. 665,
92 L.Ed. 840 (1948) 17

Wright vs. Georgia, 373 U.S. 284, 83 S.Ct. 1240,
10 L.Ed. 2d 349 (1963) 17

Page

Louisiana Cases

State vs. Drew, 367 So.2d 500 (1978) 14

State vs. Dousay, 378 So.2d 414 (1979) 15

State vs. Parish, 405 So.2d 1080 (1981) 13

State vs. Sosa, 446 So.2d 429 (1984) 14

State vs. Thomas, 406 So.2d 1325 (1981) 11

State vs. Turnbull, 377 So.2d 72 (1979) 13

State vs. Willie, 422 So.2d 1128 (1982) 14

Lower Federal Court Decisions

Heyman vs. Louisiana, 269 F. Supp. 36 (E.D. La. 1967) ...15

Scott vs. D.A. Jefferson Parish, 309 F.Supp. 835 (1970) 15

U.S. vs. Kelly, 328 F.2d 277 15

U.S. vs. Levy, 533 F.2d 969 (5th Cir. 1976) 17

U.S. vs. Pendon, 556 F.2d 278 (5th Cir. 1977) 15

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

OPINIONS BELOW

After his conviction on September 6, 1984, Petitioner appealed to the Honorable First Circuit Court of Appeal, State of Louisiana, which rendered its opinion on the 29th day of May, 1985. The notice of Judgment was issued by the Court of Appeal on that same day. An Application for Rehearing on behalf of appearer was timely filed on June 10, 1985. The Application for Rehearing was denied by notice issued by the First Circuit Court of Appeal on June 27, 1985. Thereafter Petitioner applied for Review to the Honorable Supreme Court for the State of Louisiana and for a Stay Order (to prohibit his transfer to an institution to serve his sentence).

The Louisiana Supreme Court refused the Stay Order on July 22, 1985. Thereafter, it refused to review the conviction of Petitioner and refused to review the decision of the First Circuit Court of Appeals, said denial occurring on October 4, 1985. Louisiana Supreme Court Docket Number 85-K-1426, Appendix D.

GROUNDS FOR JURISDICTION

This Petition results from a criminal prosecution brought against Petitioner under which he was charged and convicted in the 19th Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, of aggravated rape, LSA-R.S. 14:42 and aggravated burglary, LSA-R.S. 14:60 and was sentenced to life imprisonment for rape and twenty (20) years at hard labor for the aggravated burglary.

Petitioner appealed to the First Circuit Court of Appeal for Louisiana; the conviction and sentence of the defendant was affirmed. A copy of this opinion, dated May 29, 1985 is attached as Appendix A. Petitioner then applied for a rehearing which was denied on June 27, 1985. See Appendix B. Petitioner then applied to the Louisiana Supreme Court for review of his conviction and sentence, and his request for review was denied on October 4, 1985. See Appendix D. The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. 1257(3). The federal questions are substantial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases aris-

ing in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Constitution of the United States, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana Constitution, Article 1, Section 13:
"Rights of the Accused

Section 13. When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully

of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents."

Louisiana Revised Statutes, L.S.A.-R.S. 14:41:

"Rape is the act of anal or vaginal sexual intercourse with a male or female person who is not the spouse of the offender, committed without the person's lawful consent. Emission is not necessary; and any sexual penetration, vaginal or anal, however slight is sufficient to complete the crime.

For the purpose of this Chapter, a person shall not be considered to be a spouse if a judgment of separation from bed and board has been rendered.

Louisiana Revised statutes, L.S.A.-R.S. 14:42 (prior to its 1984 amendment, as it read for the purpose of Petitioner's trial):

"Aggravated rape is a rape committed where the anal or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) Where the victim resists the act to the utmost, but whose resistance is overcome by force; or

(2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution; or

(3) Where the victim is prevented from resisting the act because the offender is armed with a dangerous weapon; or

(4) Where the victim is under the age of twelve (12) years. Lack of knowledge of the victim's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parol, probation or suspension of sentence."

Louisiana Revised Statute, L.S.A.-R.S. 14:42.1:

"Forcible rape is a rape committed where the anal or vaginal sexual intercourse is deemed to be without the lawful consent of the victim because the victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape.

"Whoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than two nor more than forty years. At least two years of the sentence imposed shall be without benefit of probation, parole, or suspension of sentence."

Louisiana Code of Criminal Procedure, Article 230:

"The person arrested has, from the moment of his arrest, a right to procure and confer with counsel and to use a telephone or send a messenger for the purpose of communicating with his friends or with counsel."

Louisiana Code of Criminal Procedure, Article 814 (in pertinent part):

"A. The only responsive verdicts which may be

rendered when the indictment charges the following offenses are:

* * *

8. Aggravated rape:
Guilty.
Guilty of attempted aggravated rape.
Guilty of forcible rape.
Guilty of attempted forcible rape.
Guilty of sexual battery.
Not guilty.

* * *"

Louisiana Code of Criminal Procedure, Article 859:

"The court shall arrest the judgment only on one or more of the following grounds:

(1) The indictment is substantially defective, in that an essential averment is omitted;

(2) The offense charged is not punishable under a valid statute;

(3) The court is without jurisdiction of the case;

(4) The tribunal that tried the case did not conform with the requirements of Articles 779, 780 and 782 of this code;

(5) The verdict is not responsive to the indictment, or is otherwise so defective that it will not form the basis of a valid judgment;

(6) Double jeopardy, if not previously urged; or

(7) The prosecution was not timely instituted, if not previously urged.

(8) The prosecution was for a capital offense or for an offense punishable by life imprisonment, but was not instituted by a grand jury indictment.

Improper venue may not be urged by a motion in arrest of judgment."

STATEMENT OF THE CASE

The State alleged by Grand Jury indictment that Petitioner committed an aggravated rape upon Marilyn Miller on the 13th day of March, 1984, said indictment being returned on the 14th day of March, 1984. Appendix F. That Grand Jury indictment also alleged a charge of aggravated burglary.

On the same day of the offenses, the defendant was arrested pursuant to a warrant issued, and was subject to a line up procedure at the East Baton Rouge Parish Prison. Prior to the line up, the Assistant District Attorney in charge thereof arranged for an employee of the East Baton Rouge Parish Public Defender's Office to be present for the line procedure. Apparently, no attorneys were available for the line up, so the Public Defender's Office sent an investigator who had experience with line up procedures, Mr. Robert Matthews. During the line up, the representative from the Public Defenders Office noted hesitance on the part of the victim (Motion Transcript, p.p. 21, 23, Appendix G); however, the representative was prohibited from observing the remainder of the line up procedure. Robert Matthews testified that the line up commenced in accordance with standard procedures, but the victim did not make an identification immediately following the viewing (pages 92, 93, Court record). Contrary to standard procedure, the victim was then escorted to another room where she sat at a table with a pen and a card upon which she was to make certain notations. At that

time, she made no identification. As she started to mark the card, the Assistant District Attorney stopped her, turned to Mr. Matthews and told him to leave the room. Mr. Matthews desired to stay to see the rest of the proceeding, but was prohibited from doing so. Instead of leaving, Mr. Matthews watched the remaining proceedings through a glass door and noted that many police officers were gathered around the victim where she sat at the table. They remained in that position for two or three minutes (Record page 96) ; the Assistant District Attorney then took the victim to another room where they remained alone for a minute or so. The District Attorney then communicated to Mr. Matthews that the victim picked the petitioner. The Assistant District Attorney explained to Mr. Matthews that he took the victim in the back "just to make sure about the identification". (Record page 96, Motion Transcript p. 24, Appendix H).

The Petitioner immediately attacked the validity of the line up procedure, Appendix G, and moved to exclude the evidence thereof from the trial. The Trial Court denied the motion to suppress on May 14, 1984. The Motion alleged violation of the 6th Amendment to the United States Constitution.

Further, defendant moved, after his conviction, to arrest the Judgment because of the failure of the statutory scheme to provide appropriate due process, which motion was denied on September 20, 1984, being the same date that the defendant was sentenced. Appendix J.

As pointed out in the statutory articles cited herein, the lack of validity of a statute can be properly raised by a Motion in Arrest of Judgment. The Motion alleges that the statutory scheme violates federally protected rights under the 5th and 14th Amendments to the United States Constitution.

Both of the questions presented here for review were presented timely, and perfected as Assignments of Error during the Appellate process. Both issues were treated by the First Circuit Court of Appeal in its opinion, said opinion upholding the rulings of the Trial Court. See Appendix A.

REASONS FOR ALLOWANCE OF THE WRIT

I. The line up procedure

The following factors should be considered in granting this Writ.

1. The "adversay process" had commenced by the issuance of a warrant for the arrest of the Petitioner prior to the line up; See Appendix E.

2. The Assistant District Attorney, who by his testimony deemed the line up procedure to be "critical", Motion Transcript, p. 71, Appendix I, should not have then been allowed to eject the employee sent by the Public Defender's Office for the purpose of observing the line up procedure, regardless of whether or not the adversary process was commenced;

3. This Honorable Court should consider the fact that a Grand Judy indictment was returned the very next day following the line up procedure. Appendix F.

It is acknowledged that the right to Counsel normally does not attach to a preindictment line up. *United States vs. Wade*, 388 U.S. 218, 18 L.Ed. 2nd 1149, 87 S.Ct. 1926 (1967); *Gilbert vs. California*, 388 U.S. 263, 18 L.Ed. 2nd 1178, 87 S.Ct. 1951 (1967); *Kirby vs. Illinois*, 406 U.S. 682, 32 L.Ed. 2nd 411, 92 S.Ct. 1877 (1972).

In *Moore vs. Illinois*, 434 U.S. 220, 54 L.Ed. 2nd 424, 98 S.Ct. 458 (1977), this Honorable Court reversed the conviction of a defendant who had been subjected to a rather informal preliminary hearing in the presence of the victim. Therein the Court stated:

> "The Court of Appeals took a different view of the case. It read Kirby as holding that evidence of a corporeal identification conducted in the absence of defense counsel must be excluded only if the identification is made after the defendant is indicted. App. 45-46. Such a reading cannot be squared with Kirby itself, which held that an accused's rights under Wade and Gilbert attached to identifications conducted 'at or after the initiation of adversary judicial criminal proceedings,' including proceedings instituted 'by way of formal charge [or] preliminary hearing.' 406 U.S. at 689, 32 L.Ed 2nd 411, 92 S.Ct. 1877..."

The Court then went on to say that the defendant was entitled to counsel under Illinois Law and, therefore, entitle to Counsel at the time of the identification process; that the State could not buttress the case by unfair reliance upon the uncounselled identification.

Other opinions of this Honorable Court would indicate that an arrest warrant may signal the start of the Judicial process. *Brewer vs. Williams*, 430 U.S. 387, 51 L.Ed. 2nd 424, 92 S.Ct. 1232 (1977); there should be no reason to distinguish between "judicial" and "adversary" process in Petitioner's case. Cf. *United States vs. Gouveia*, 81 L.Ed 2d 146, 104 S.Ct. 2292 (1984). However, the Louisiana Constitution, Article 1 Section 13 clearly provides that certain rights attach at the time of arrest. Article 230 of the Louisiana Code of Criminal Procedure expressly provides that an accused

"from the moment of arrest" has a right to procure and confer with counsel. In construing these provisions, the Louisiana Supreme Court said in *State vs. Thomas*, 406 So.2d 1325 (1981):

> "Certainly, a timely request that the police notify (or permit an accused to notify) counsel of a forthcoming line up ought always be honored. Nevertheless, in the absence of a bad faith effort to circumvent defendants' statutory right to counsel following arrest, and given the showing made in the case that the line-up was conducted according to fair and standard police procedure, the exclusion of reliable evidence is too great a price to impose solely because of the absence of counsel at the line-up."

Therefore, as in *Moore vs. Illinois*, supra, a right to counsel had attached.

In this case, Petitioner was granted the right to have a representative of the Public Defender's Office present, but the right was then taken away by the Assistant District Attorney. This Honorable Court has always reserved the right to review the facts of each situation, in order to insure that appropriate safeguards apply. In *Kirby vs. Illinois*, 406 U.S. 682, 32 L.Ed. 2nd 411, 92 S.Ct. 1877 (1972) the Court stated:

> "What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. As the Court pointed out in Wade itself, it is always necessary to 'scrutinize *any* pretrial confrontation . . .' 388 U.S., at 227, 18 L.Ed 2nd at 1157. The Due Process Clause of the 5th and 14th Amendments forbids a lineup that is unnecessarily suggestive and condusive to irreparable mistaken identification. *Stovall vs. Denno*, 388 U.S. 293,

18 L.Ed 2nd 1199, 87 S.Ct., 1967; *Foster vs. California*, 394 U.S. 440, 22 L.Ed. 2nd, 402, 89 S.Ct., 1127. When a person has not been formally charged with a criminal offense, Stovall strikes the appropriate constitutional balance between the right of the suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime."

Therefore, a review of the "totality of the circumstances", *Foster vs. California*, 394 U.S. 440, 22 L.Ed. 2nd 402, 89 S.Ct. 1127 (1969) would justify a review of this case and, ultimately, a reversal of the conviction.

It is of no moment whether the defendant suffered any "foul" blows at the hands of the prosecutor, *United States vs. Ash*, 413 U.S. 300, 37 L.Ed. 2d 619, 93 S.Ct. 2568 (1973); it matters only that there was a constitutional safeguard which was violated, which could have resulted in severe prejudice not only to this defendant but others found in the same position. *Foster vs. California, Supra; Moore vs. Illinois, Supra.*

The State should have allowed Mr. Matthews to stay during the entire process, in order to avoid any question concerning the manner in which the line up was conducted. However, the State chose to eject him from the proceedings. It is submitted that where the prosecutor is present and involved in the conduct of the line up, an "adversary process" has commenced.

II. Statutory Vagueness

The petitioner contends that his Motion in Arrest of Judgment, questioning the constitutionality of LSA-R.S. 14:42 and LSA-R.S. 14:42.1 should have been granted.

Article 859 of the Louisiana Code of Criminal Procedure provides in pertinent part as follows:

> "The Court shall arrest the judgment only on one or more of the following grounds:
>
> * * *
>
> (2) The offense charges is not punishable under a valid statute;
>
> * * *"

The text of LSA-R.S. 14:41, LSA-R.S. 14:42 and LSA-R.S. 14:41.1 are set forth in this writing under "Constitutional and statutory provisions involved."

Louisiana jurisprudence admits that the only distinction between aggravated and forcible rape is the degree of force employed and the extent to which the victim resists. See *State vs. Turnbull*, 377 So.2d 72 (La. S.Ct. 1979), (decided prior to the 1981 amendment of and the 1978 reenactment of the aggravated rape and forcible rape statutes). The defendant in *Turnbull*, was convicted of *simple* rape.

In *State v. Parish*, 405 So.2d 1080 (La. Supreme Court 1981, on re-hearing) the Court held as follows:

> "In interpreting the articles of the criminal code all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision. La.R.S. 14:3. Accordingly, the closely related offense of forcible rape, La.R.S. 14:42.1 must be considered in determining the meaning of aggravated rape under LaR.S. 14:42 (2) and in considering whether the evidence is sufficient to support the conviction."

In *Parish* the Supreme Court reversed a conviction for

attempted aggravated rape and remanded with instructions to enter a judgment of conviction of attempted forcible rape and to impose the appropriate sentence therefor.

In 1982, the Louisiana Supreme Court in *State v. Willie*, 422 So.2d 1128 (La. S.Ct. 1982) was faced with determining whether or not a conviction for aggravated rape could stand considering the lack of definitional distinction between aggravated rape and forcible rape. Under previous statutory construction, the Louisiana Supreme Court refused to declare the lack of distinction between aggravated rape and forcible rape unconstitutional; see *State v. Drew*, 367 So.2d 500 (La. Supreme Court, 1978) and certain language in *Parish* emphasizing the responsiveness of verdicts; such construction leaves the decision to a jury who must interpret statutory contruction and apply their interpretation to the facts. Again, in *Willie*, the Court felt compelled to review the *facts* of the case for the purpose of reaching a determination that they would not declare the statute unconstitutional. See also *State v. Sosa*, 446 So.2d 429 (La. App. 4th Cir., 1984), where the Court found that the distinction between the statutes was not "vague and blurred", citing *Parish* and again holding that albeit the legal definition of both crimes is virtually identical that a distinction can be made based upon the degree of force and the extent of the *victim's* resistance. The Court held, again on the facts, that there was no "gray area" which would justify a review.

Louisiana Courts have opted to review the *facts* in order to reach a conclusion presumable upholding the constitutionality of the legislative scheme; the Courts have avoided making a determination about the *face* of the statutes, as worded. Petitioner avers that the wording of statutes left the jury no standard by which to judge whether or not Petitioner was guily of aggravated rape or forcible rape; while the definition

of each crime is virtually identical, the penalties for aggravated rape are more severe. Petitioner was convicted of aggravated rape.

The Fourteenth Amendment requires that an accused receive a fair trial. *Massey v. Moore*, 348 US 105, 99 L.Ed. 135, 75 SCT 145; *Betts v. Brady*, 316 US 455, 86 L.Ed. 1595, 62 SCT 1252. Inherent in that right is the protection afforded by the "void-for-vagueness" doctrine, which applies both civilly and criminally. *Lanzetta v. New Jersey* (1939) 306 US 451, 59 SCT 618, 83 L.Ed. 888; *Connally v. General Construction Company*, (1926), 269 US 385, 46 SCT 126, 70 L.Ed. 322; *Scott v. D.A., Jefferson Parish*, 309 F. Supp. 833 (1970). Conviction under an invalid criminal statute is unconstitutional. *U.S. v. Kelly*, 328 F.2d 277, *Grayned v. City Rockford*, 408 US 104, 33 L.Ed. 2d 222, 92 SCT 2294. It follows, then, that conviction under an unconstitutionally vague criminal statute is a violation of due process. As stated above, vagueness of a criminal statute violates due process. *Rochia v. California*, 342 US 165, 96 L.Ed. 183, 72 S.Ct. 205 (1951); *US v. Pendon*, 556 F.2d 278 (Fifth Cir. 1977).

Vagueness also violates an accused's right to notice and nature of the accusation against him. *Powell v. Alabama*, 287 US 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). A statute violates equal protection if it fails to prevent unequal treatment to those who do acts of the same type. *Griffin v. Illinois*, 351 US 12, 100 L.Ed. 891, 76 S.Ct. 585; *Heymann v. Louisiana*, 269 F. Supp. 36 (E.D. La. 1967), *Norrell v. Illinois*, 373 US 420, 10 L.Ed. 2d 456, 83 S.Ct. 1356, reh den 375 US 870, 11 L.Ed. 2d 99,84 S.Ct. 27 (1963); *Williams v. Illinois*, 399 US 235, 26 L.Ed. 2d 586, 90 S.Ct. 2018 (1970).

See also *State v. Dousay*, 378 So.2d 414 (La. S.Ct. 1979) wherein the Louisiana Supreme Court discussed vagueness.

Recognizing the dangers of a standardless statute, the Court stated at page 416:

> "Two fundamental concepts are embodied in the principle that the vagueness of a criminal enactment may render it unconstitutional. The first of these is that individuals must be given *adequate notice* that certain contemplated conduct is proscribed and punishable by law. The second is that *adequate standards* must be provided for those charged with determining the guilt or innocence of an accused. See Schopler, Annotation, Indefiniteness of Language as Affecting Validity of Criminal Legislation or Judicial Definitions of Common-Law Crime—Supreme Court Cases, 16 L.Ed. 2d 1231 (1966); Comment, Reconciliation of Conflicting Void-for-Vagueness Theories Applied by the Supreme Court, 9 Houston L.R. 82 (1971).
>
> "With regard to the requirement of adequate notice, this court has held that the constitutional guarantee that an accused shall be informed of the nature and cause of the accusation against him requires that a penal statute must describe unlawful conduct with sufficient particularity and clarity that ordinary men of reasonable intelligence are capable of discerning its meaning and conforming their conduct thereto. State v. Payton, 361 So.2d 866 (La. 1978); Connick v. Lindsey, 310 So.2d 89 (La. 1975). *The due process clause of the Louisiana Constitution has also been found to demand that words and phrases employed in statutes or regulations may not be so vague and indefinite that any penalty prescribed for their violation constitutes the taking of liberty or property without due process of law.* Connick v. Lucky Pierre's, supra; State v. Lindsey, supra. Siminarly, a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of the due process clause of the Fourteenth Amendment of the United States Constitution. Palmer v. City of

Euclid, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed. 2d 98 (1971); Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed 2d 349 (1963)." (Emphasis Supplied).

The standards is that of the reasonable man; men of common intelligence cannot be required to guess at the meaning of a penal enactment. *U.S. v. Levy*, 533 F.2d 969 (Fifth Cir. 1976); *Winters v. New York*, 33 US 507, 678 S.Ct. 665, 92 L.Ed. 840 (1948); *U.S. v. Harris*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

In summation there are four possibilities for a statute's unconstitutionality:

(1) Vagueness as a violation of the accused's right to notice and nature of the charge against him;

(2) Vagueness as a violation of due process;

(3 Vagueness as a violation of equal protection;

(4) Inability of the accused to determine, at least the range of sentence applicable as a violation of due process, or equal protection.

Under the subject statutory scheme, an accused cannot possibly determine the range of his sentence, since he cannot determine which charge is appropriate. Further, if two individuals commit rape in exactly the same manner, one may be exposed to a life sentence, while the other may receive a lesser penalty. Nothing could be a more clear violation of equal protection.

A reasonable man (juror) cannot possibly determine the difference in aggravated and forcible rape in the cases that arise in Louisiana, since there would appear to be none. Further, while courts will try to reconcile statutes and will avoid

interpretations that give absurd results, in this case there can be no reconciliation; the absurdity that the Louisiana Legislature has created is unavoidable.

Since the possibility exists that two defendants committing the same exact type of act will be subjected to different possible punishments, the Louisiana Legislative scheme for defining rape and its punishment, is violative of the Equal Protection Clauses of both the United States and Louisiana Constitutions; that scheme is totally ambiguous and vague, thereby rendering same unconstitutional under the void-for-vagueness doctrine.

CONCLUSION

It is submitted that substantial issues, involving safeguards presented by the United States Constitution have been raised and that this Honorable Court should review the proceedings and prior decisions by the Louisiana Courts.

Respectfully Submitted,

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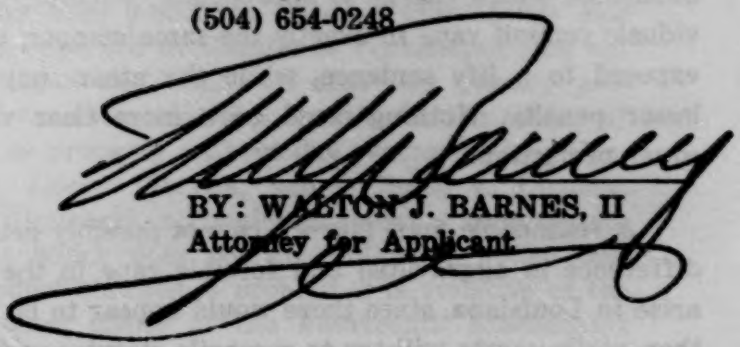

BY: WALTON J. BARNES, II
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the above and foregoing petition for a Writ of Certiorari have been served upon the State of Louisiana through the Honorable Bryan Bush, District Attorney in and for the Parish of East Baton Rouge and Dennis Weber, Assistant District Attorney, 5th Floor, Government Complex, 222 St. Louis Street, Baton Rouge, Louisiana 70801 by placing same in the United States Mail, properly addressed and postage prepaid on this 27th day of November, 1985.

WALTON J. BARNES, II
P.O. Box 596
Zachary, La. 70791
(Admitted to United States Supreme Court Bar, October 1, 1979)

APPENDIX A

STATE OF LOUISIANA	**STATE OF LOUISIANA**
VERSUS	**COURT OF APPEAL**
JAMES HENRY KIRKLEY	**FIRST CIRCUIT**
	NUMBER KA 84 1290

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF EAST BATON ROUGE, LOUISIANA, NUMBER 3-84-388, THE HONORABLE DONOVAN PARKER, JUDGE PRESIDING.

BEFORE: WATKINS, CRAIN AND ALFORD, JJ.

ALFORD, J.

MAY 29, 1985

James Henry Kirkley was charged by grand jury indictment with aggravated rape and aggravated burglary, violations of LSA-R.S. 14:42 and 14:60, respectively. Defendant pled not guilty and, following trial by jury, was convicted as charged on each count. The trial court sentenced defendant to a term of life imprisonment without benefit of probation, parole or suspension of sentence on the aggravated rape conviction and to a concurrent 20 year sentence for the aggravated burglary conviction.[1]

Defendant brings this appeal urging 22 assignments of error:

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1. The record is devoid of evidence that the trial court waited the required twenty-four hours after defendant's motion for new trial was denied before imposing sentence, (La. C.Cr.P. art. 873) nor does the record indicate that defendant waived that waiting period. Defendant does not argue or in any way show that he was actually prejudiced by the failure of the trial court to observe the waiting period. Such failure on the part of the trial court is harmless error where defendant does not show actual prejudice. **State v. Mason**, 447 So.2d 1134 (La. App. 1st Cir. 1984).

1. The trial court erred in failing to suppress evidence of a line-up in which defendant was forced to participate without aid of counsel.

2. The trial court erred by allowing in evidence certain physical and tangible objects without a proper foundation thereby prejudicing defendant. These items included, but were not limited to, hair samples and fingerprints.

3. The trial court erred in failing to grant a motion for mistrial when Lt. Duane Jones, a state witness, made an improper and prohibited reference to defendant's past criminal record.

4. The trial court erred in allowing the verdict to stand when no corroborative evidence of the victim's testimony was presented to show the existence of any aggravating circumstances which would result in a finding of guilty of aggravated rape or aggravated burglary.

5. The trial court erred in allowing the state to improperly impeach a defense witness, Robert Matthews, by allowing the state to dwell upon circumstances surrounding the criminal record of that witness. This improperly enlarged the scope of impeachment, thereby creating undue prejudice in the minds of the jurors.

6. The trial court erred by denying defendant's motion for new trial on the ground that the state failed to establish the factual proof constitutionally required for a finding of guilt.

7. The trial court erred in failing to order alternative relief requested in the motion for new trial. That relief consisted of a request for reduction of the verdict for forcible rape and/or simple burglary.

8. The trial court erred in failing to grant a motion

for new trial on the grounds of double jeopardy as defendant was convicted of two offenses by the same indictment.

9. The trial court erred in failing to grant defendant's motion in arrest of judgment as the statute charging defendant with aggravated rape was unconstitutionally vague.

10. The trial court erred in failing to grant defendant's motion in arrest of judgment based on double jeopardy.

11. The trial coure erred in failing to give special jury instructions requested by the defense.

12. The trial court erred in allowing testimony which attempted to establish foundation for the introduction of physical evidence by use of witnesses who were not properly qualified to collect the samples sought to be introduced.

13. The trial court erred by admitting in evidence a window screen without foundation or without establishing chain of evidence.

14. The trial court erred by admitting certain items of clothing in an in globo exhibit (state exhibit no. 5) without proper foundation being laid for each of the items of clothing.

15. The trial court erred by allowing introduction of a photograph of a pickup truck which was irrelevant and immaterial.

16. The trial court erred by admitting a photographic line-up which included defendant (state exhibit no. 7). Appropriate foundation for admissibility of said photograph was not established, and defendant was compelled to participate in the line-up without benefit of counsel.

17. The trial court erred by admitting into evidence

a written motion to compel the surrender of bodily substances from defendant (state exhibit no. 13). That pleading was inadmissible on its face and created improper influence on the jury.

18. The trial court erred by admitting in evidence vials of defendant's blood (state exhibit nos. 14 and 19) without proper foundation and without the appropriate chain of evidence.

19. The trial court erred by admitting rape kit no. 1-60 (state exhibit no. 16) as an in globo exhibit without properly identifying each item or establishing the chain of evidence.

20. The trial court erred by admitting in evidence head hair, pubic hair and saliva allegedly taken from defendant and a written request for scientific analysis (state exhibit nos. 17 and 18).

21. The trial court erred by allowing unidentified fingerprints (state exhibit no. 25) n evidence. These fingerprints were not established as belonging to or being made by defendant.

22. The trial court erred by admitting palm prints in evidence as the state failed to establish a proper chain of evidence.

Testimony at trial indicated that during the early morning hours of March 13, 1984, a single woman, who resided alone, was awakened by a male intruder clad only in a shirt and socks. While holding a knife at the woman's throat, the intruder forced the woman to disrobe and submit to sexual intercourse. Thereafter the woman was forced to lay in a prone position on her bed while the intruder contemplated her fate aloud. The woman was raped a second time and then directed by her assailant to a bathroom where she was ordered to remain in the shower until he had an opportunity to depart.

Police officers were summoned to the scene shortly after the incident had concluded. The crime scene was secured and the point of entry, a window opening into the victim's dining room, was dusted and photographed for latent fingerprints.

When questioned by police about any notewotrhy events prior to the attack, the victim related that a man operating a black and silver truck with red stripes had driven by her home about two weeks prior to the incident and had directed a flirtatious remark at her while she worked in her yard. The victim also noted that she had later seen that same truck parked at a neighbor's house.

As part of his follow-up investigation of the incident, Lt. Duane Jones of the East Baton Rouge Parish Sheriff's office determined the municipal address and the identity of the occupants of the neighboring home where the victim had seen the truck parked. One of the persons listed at that address was defendant, whose fingerprints were on file with law enforcement agencies. By comparing defendant's known fingerprints with latent fingerprints gathered from the crime scene, Louisiana State Police crime laboratory personnel positively identified defendant as the individual whose fingerprints were found at the point of entry of the victim's home.

Based on that information, an arrest warrant was procured and defendant was arrested in St. Francisville, Louisiana, that afternoon. A physical line-up conducted at parish prison later that evening resulted in the victim's positively identifying defendant as the individual who had raped her at knife point.

ASSIGNMENTS OF ERRORS NOS. 1 AND 16:

By means of these assignments, defendant contends that the trial court erred by failing to suppress the results of a

physical line-up and by admitting photographic evidence of that line-up at trial, because defendant was forced to participate without aid of counsel.

An accused's Sixth Amendment right to the presence of counsel at a physical line-up is applicable only in cases in which the line-up is conducted at or after initiation of adversary judicial criminal proceedings. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Furthermore, exclusion of a line-up identification is not required under the Louisiana constitutional right to counsel, La. Const. Art. I, § 13, where a line-up is conducted according to fair standards of police procedure and when there is no bad faith effort to circumvent the accused's right to counsel following arrest. See *State v. Thomas*, 406 So.2d 1325 (La. 1981); *State v. Williams*, 442 So.2d 740 (La. App. 1st Cir. 1983).

The instant line-up took place after defendant's arrest, but before institution of formal legal proceedings. Since defendant had not retained counsel when the line-up was conducted, the public defender's office was notified. Robert Matthews, an investigator with the public defender's office, appeared as the representative of that office. Mr. Matthews aided defendant in selecting five other white prisoners to participate in the line-up and noted that defendant picked the number he wore during the line-up procedure.

Defense counsel does not argue the procedure used in the live line-up was suggestive nor that attention of the victim was unduly focused on defendant. Rather, according to the estimony of Mr. Matthews, the victim was hesitant in her selection and did not mark the selection card in his immediate presence.

As evidence of the victim's hesitancy, Mr. Matthews

noted that each of the six line-up participants was required to come forward and speak twice. However, both the victim and Sgt. Weber, a sheriff's deputy present during the procedure, testified that each participant was called forward a second time because a jet aircraft had passed overhead preventing the victim from initially hearing each participant.

It is undisputed that after viewing the line-up, the victim was taken to a nearby room. From that point in time, the testimony of Mr. Matthews departs from that of the victim and Sgt. Weber. Mr. Matthews testified that only he was excluded from the room where the victim was taken and that he observed through a glass pane eight or nine individuals, presumably police officers, gathered around the victim. Furthermore, Mr. Matthews noted that he never actually saw the victim designate her selection.

In contrast, Sgt. Weber and the victim each testified that all police officers and Mr. Matthews were asked to leave the room where the victim was to write her selection, if any, because of noise and confusion attendant to the large number of persons present. At that point only the victim and an assistant district attorney remained in the room. The victim testified that she was certain of defendant's identity as her assailant after viewing the line-up, but did not mark her card until taken to the nearby room because she thought she was to sit at a desk to write down any decision and remarks. Further, the victim noted that no one made any suggestions as to her selection.

Thus the record reveals that contrary to defendant's assertion, this case does not involve an effort to seclude defendant from counsel during the conduct of an identification procedure. The showing made in this case was that the line-up was conducted according to fair and standard police

procedure. Although Mr. Matthews was excluded from the victim's immediate presence when she physically marked her choice, the state refuted any allegation of coaching or suggestion by officers or the assistant district attorney. The trial judge's determination on the admissibility of an identification is accorded great weight; we will not disturb that determination on appeal as the evidence fails to reveal an abuse of discretion. See *State v. Bickham*, 404 So.2d 929 (La. 1981).

Additionally, it is abundantly clear from this record that the victim's in court identification of defendant, not challenged by defendant, stems from her independent recollection of defendant from the time of the offense and was not a product of a tainted line-up. See *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 401 (1972). She had ample opportunity to view her assailant who remained in her bedroom for a period in excess of one hour. He wore no mask or disguise, and it had become light outside prior to his leaving. Her description of defendant to the police immediately following the incident was detailed. At trial she was positive that her assailant was defendant.

Accordingly, these assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 3:

By this assignment, defendant complains that the trial court erred by failing to grant a mistrial when Lt. Duane Jones, a state witness, made a reference to defendant's past criminal record.

The record reveals the following colloquy during direct examination of Lt. Jones whereby the state sought to explain the sequence of events leading to defendant's arrest:

Q. Now, having learned that a person by the name of Kirkley lived at that address, what, if anything, did you then do?

A. I took the last name, Kirkley, and asked our criminal record section to make a criminal records check on the last name, which they did and called me back saying they did have one on a James Kirkley, living at the same address, 5433 Lorranger.

Thereafter, defense counsel promptly requested that the jury be removed from the courtroom and moved for a mistrial, arguing that the reference by Lt. Jones indicated that defendant had a police record. The trial judge denied the motion and admonished the jury that the criminal records bureau contains records from many sources and that accordingly they should not infer from Lt. Jones' statement that defendant had a criminal record.

Louisiana Code of Criminal Procedure article 770 does mandate a mistrial upon motion of defendant when a remark or comment made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to another crime committed or alleged to have been committed by defendant as to which evidence is not admissible. A police officer, however, is not a court official within the meaning of La. C.Cr.P. art. 770. *State v. Nathan*, 444 So.2d 231 (La. App. 1st Cir. 1983), *writ denied*, 445 So.2d 1232 (La. 1984). The statement in question did not actually refer to another crime despite a possible inference to that effect. The jury was admonished to disregard any impermissible inference, and that was sufficient to assure the defendant a fair trial. La. C.Cr.P. art. 771.

This assignment lacks merit.

ASSIGNMENTS OF ERROR NOS. 4, 6, 7, 19, 20, 21 and 22:

By these assignments, defendant contends that evidence adduced at trial was insufficient to support the instant convictions. In particular, defendant urges that testimony of the victim, without corroboration, is insufficient to establish aggravating circumstances. We disagree.

The standard of review when considering the sufficiency of the evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This standard for appellate review of facts in criminal cases has been made statutory. La. C.Cr.P. art. 821; *State v. Korman*, 439 So.2d 1099 (La. App. 1st Cir. 1983).

The victim testified that about 5:30 a.m. on March 13, 1984, she awoke to find a white man on top of her with a knife held to her throat. At knifepoint, she was forced to submit to sexual intercourse, both with defendant on top of her and from behind. Her testimony was positive about sexual penetration. In addition, vaginal washings obtained shortly after the incident were positive for seminal fluid.

The victim's testimony clearly establishes that she was prevented from resisting the acts because the attacker was armed with a dangerous weapon, to wit, a hunting knife, which the victim described. LSA-R.S. 14:42(3). The evidence also clearly establishes that the victim was prevented from resisting the act by fear of death accompanied by the apparent power of execution, i.e., the perpetrator was armed with a knife which he threatened to use. The victim testified that she was forced to submit because she feared that defendant would kill her.

The record also reveals that the victim had a neighbor call police about 7:30 a.m. shortly after the assailant left her home. Officers who investigated the incident found evidence of forced entry as plastic strips were removed from a window pane on the same line as the locking device of a window which leads to the victim's dining room. Various latent fingerprint lifts of sufficient quality to make a comparison were obtained by crime scene investigators.

Carol Richard, a qualified latent fingerprint analyst with the Louisiana State Police Crime Laboratory, positively identified defendant's left middle fingerprint and defendant's right thumbprint from the exterior of the screen covering the window where entry had occurred. Significantly, defendant's palm print was identified from the *interior* windowsill immediately below the point of entry. The victim testified that she had not met the man who raped her prior to the incident.

In addition, as detailed above, the victim identified defendant from a physical line-up, during the evening following the incident, and made an in-court identification of defendant as her assailant.[2]

Other serological evidence introduced revealed that the victim and her assailant were both non-secretors. Approximately 20 percent of the population fall into this category.

The vaginal washings from the victim did not contain

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2. Defendant makes much of the fact that the fingerprints of another individual were also submitted to the Louisiana State Police Crime Laboratory for comparison with the latent fingerprint lifts. However, this individual's fingerprints did not match. The record further reveals that his name was submitted by one of the investigating officers only because he knew that individual lived in the area of the rape and that he had been previously arrested for sex crimes. Therefore, this information in no way weakened the state's case against defendant.

any spermatozoa. Defendant argues that he could not be the individual who had sexual intercourse with the victim because he produced a semen sample under laboratory conditions which contained numerous motile spermatozoa. However, even defendant's own witness, Dr. Hypolite Landry, testified under cross examination that not all areas of the vaginal vault always contain a uniform distribution of spermatozoa.

Defendant presented testimony of Mark Burns and William Gordon, two of his friends. Mark Burns testified that he met defendant at approximately 10:00 p.m. on March 12, 1984, at a lounge on Old Jefferson Highway. He last saw defendant that night at William Gordon's home at about 3:00 a.m. William Gordon also placed defendant at his apartment during the early morning hours of March 13, 1984, and further testified that when defendant left his apartment it was already light outside. However, these alibi witnesses also placed defendant in the vicinity of the victim's home near the time of the attack.

The jury's verdict indicates that after considering the credibility of the witnesses and weighing the evidence, it accepted the testimony of the victim and the Louisiana State Police Crime Laboratory experts, thereby rejecting the alibi evidence presented by defendant's friends. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Such determination is a question of fact, which the appellate court does not have jurisdiction to review. *State v. Norman*, 448 So.2d 246 (La. App. 1st Cir.), *reversed in part on other grounds*, 452 So.2d 1178 (La. 1984). Moreover, the testimony of the victim is sufficient to prove the offense charged. 448 So.2d at 249.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 5:

By means of this assignment defendant contends that the trial court erred by allowing the state to improperly impeach Robert Matthews, a defense witness. In particular defendant urges that the state was allowed, during cross examination, to dwell upon circumstances surrounding the criminal record of that witness.

Pursuant to LSA-R.S. 15:495 evidence of conviction of a crime is admissible for the purpose of impeaching the credibility of a witness. The Louisiana Supreme Court has held that the extent into which this inquiry into past convictions can be permitted is dependent upon each individual case. *State v. Chaney*, 423 So.2d 1092 (La. 1982). Accordingly, the trial judge has great discretion in determining the type of inquiry which will be allowed and his discretion will not be disturbed on appeal absent a showing of abuse. Id.

In response to questioning by the prosecutor, Mr. Matthews admitted that he had been convicted of armed robbery and had served a twelve year sentence at Angola State Prison. Other questioning by the prosecutor related to Mr. Matthews' position as a "jail house lawyer", representing other inmates, while incarcerated. This line of questioning did not impermissibly inquire into details of far-ranging and irrelevant matters as Mr. Matthews had attended the physical line-up as defendant's representative. His experience and knowledge of the criminal justice system were relevant to demonstrate his competence to evaluate the manner in which that line-up had been conducted — an issue contested by defendant. This questioning did not go into the specific details about the commission of the offense of armed robbery, but rather attempted to place the witness' expertise in perspective for the jury.

Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NOS. 8 AND 10:

By these assignments, defendant contends that the trial court erred in denying his motion in arrest of judgment and motion for new trial grounded on the constitutional guarantee against double jeopardy.[3] Defendant urges that aggravated rape is merely an element of aggravated burglary. We disagree.

As noted above, defendant was charged by one grand jury indictment with aggravated burglary, in violation of LSA-R.S. 14:60 and aggravated rape, in violation of LSA-R.S. 14:42. Defendant was tried for both offenses at the same trial.

No person can twice be put in jeopardy for the "same offense." In *State v. Knowles*, 392 So.2d 651 (Ia. 1980), the Supreme Court citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932), outlined the following criteria for examining violations of double jeopardy:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not . . . 392 So.2d at 654.

This rule is constitutionally required by the states, *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), and is embodied in La. C.Cr.P. art. 596:

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3. Procedurally double jeopardy is a basic defense that may be raised at any time. Official Revision Comment to La. C.Cr.P. art. 859 provides that double jeopardy may be urged by motion in arrest of judgment only if not previously urged. In the instant case, that defense was not urged by motion to quash or during trial and was properly urged by motion in arrest of judgment.

> Double jeopardy exists in a second trial only when the charge in that trial is (1) Identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charges in the second trial; or (2) Based on a part of a continuous offense for which offense the defendant was in jeopardy in the first trial.

Louisiana uses both the "Blockburger test" and the "same evidence test". *State v. Steele,* 387 So.2d 1175 (La. 1980). When a defendant is charged with separate statutory crimes they need not be identical in elements or in actual proof to be the same within the meaning of the constitutional prohibition. *State v. Hayes,* 412 So.2d 1323 (La. 1982).

The Louisiana Supreme Court explains the "same evidence test" in *State v. Steele, supra,* as follows:

> If the evidence required to support a finding of guilt of one crime would also have supported conviction of the other, the two are the same offense under a plea of double jeopardy, and a defendant can be placed in jeopardy for only one. The test depends on the evidence necessary for conviction, not all the evidence introduced at trial. 387 So.2d at 1177.

Double jeopardy provisions protect an accused not only from a second prosecution on the same offense, but also from multiple punishments for the same criminal conduct. *State v. Vaughn,* 431 So.2d 763 (La. 1983).

Aggravated burglary is defined in LSA-R.S. 14:60 as follows:

> Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure,

water craft, or movable where a person is present, with intent to commit a felony or any theft therein, if the offender,

(1) Is armed with a dangerous weapon; or

(2) After entering arms himself with a dangerous weapon; or

(3) Commits a battery upon any person while in such place, or in entering or leaving such place.

Therefore, in order to prove the crime of aggravated burglary, the state must prove beyond a reasonable doubt that defendant made an unauthorized entry of the victim's home with intent to commit a theft or felony. Additionally, the state must prove beyond a reasonable doubt one of the three aggravating circumstances listed in LSA-R.S. 14:60.

As the state need only prove intent to commit a felony within the victim's home at the moment of unauthorized entry, and not the actual felony itself, it is apparent that the crimes of aggravated burglary and aggravated rape do not contain identical elements. *See State v. Anderson*, 343 So.2d 135 (La. 1977). Moreover, in this instance, evidence necessary to support a finding of guilty of aggravated burglary would not also have supported conviction of aggravated rape. The state was only required to prove one of the three aggravating circumstances listed in LSA-R.S. 14:60 and the record clearly indicates that defendant entered the victim's residence armed with a dangerous weapon. LSA-R.S. 14:60(1).

The two charges are not based on the exact same conduct. Therefore, defendant was not placed twice in jeopardy for the same offense. The trial judge did not err in denying defendant's motions.

These assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 9:

Defendant contends that the trial court erred in denying his motion in arrest of judgment. He argues that the statute under which he was indicted and convicted, LSA-R.S. 14:42, is unconstitutionally vague.

We find no merit to defendant's contention. Defendant urges that the law is ambiguous because there is virtually no difference between the elements of the crime of forcible rape and the crime of aggravated rape with which he was charged. This argument was previously rejected by the Louisiana Supreme Court in *State v. Fletcher*, 341 So.2d 340 (La. 1976) and *State v. Drew*, 360 So.2d 500 (La. 1978), *cert. denied*, 439 U.S. 1059, 99 S.Ct. 820, 59 L.Ed.2d 25 (1979).[4]

In *State v. Parish*, 405 So.2d 1080 (La. 1981), *on rehearing*, the Louisiana Supreme Court found that although the legal definition of aggravated rape as set forth in LSA-R.S. 14:42(2) and of forcible rape (LSA-R.S. 14:42.1) are virtually identical, a distinction can be made based on the "degree of force employed and the extent to which the victim resists". 405 So.2d at 1087. Additionally, in the instant case, defendant's actions fell within the purview of Subsection (3) of LSA-R.S. 14:42 as the victim was prevented from resisting the rape because her assailant was armed with a dangerous weapon.

For the reasons assigned, we find the trial court did not

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4. Although the applicable rape statutes were amended and reenacted subsequent to the **Fletcher** decision by Acts 1978, 1978, No. 239, §1, and subsequent legislative acts, this new legislation did not alter the significant phrasing of LSA-R.S. 14:42(2) and 14:43.1 (reenacted as 14:42.1). **See also, State v. Sosa**, 446 So.2d 429 (La. App. 4th Cir.), **writ denied**, 450 So.2d 361 (La.), **cert. denied**, ——— U.S. ———, 105 S.Ct. 209, 83 L.Ed.2d 140 (1984).

err in denying defendant's motion in arrest of judgment on this ground.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 11:

By this assignment, defendant contends that the trial court erred in refusing to give three special requested jury charges.

It is the duty of the trial judge to give a requested charge which does not require qualification, limitation or explanation and is not included in the general charge or in another special charge to be given, if it is wholly correct and pertinent to the case. La. C.Cr.P. art. 807; *State v. Bennett,* 454 So.2d 1165 (La. App. 1st Cir. 1984), *writ denied,* 460 So.2d 604 (La. 1984).

Defendant's requested special charges 1 and 2 were patterned jury instructions outlining the elements of aggravated burglary and forcible rape, respectively. These charges were properly refused as they were already substantially covered by the trial court's general charge.

Special charge 3, also a patterned jury instruction, addressed the elements of aggravated rape. This charge was also properly refused as it did not reflect all pertinent statutory development. It was not wholly correct as not all relevant circumstances under which defendant could be adjudged guilty of aggravated rape were addressed by that charge.

For the foregoing reasons this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 12:

By this assignment, defendant contends that the trial court erred by allowing James Churchman, a state witness, to testify in an attempt to establish a foundation for the introduction of various items of physical evidence. In particular, defendant urges that the state failed to demonstrate that Mr. Churchman possessed the necessary qualifications to collect those samples.

In accordance with court ordered authorization, Mr. Churchman collected saliva, head hair and pubic hair samples from defendant. In response to defendant's argument that it was incumbent upon the state to show that Mr. Churchman was qualified to physically remove that type of evidence, the trial court ruled that no particular expertise was required. We agree.

The record reveals that James Churchman has been employed by the Louisiana State Police Crime Laboratory for ten years. Although assigned primarily to evaluation of physical evidence, such as firearms and fingerprints, his duties do entail some crime scene investigation including collection of serological evidence. The instant sampling required only very basic knowledge of human morphology. Mr. Churchman did not perform any analytical work on the samples collected nor did he offer any opinion based on analytical findings. Moreover, his collection methods were fully detailed for the jury and defendant was given a full opportunity to cross examine Shirley Phillips, the qualified expert who actually analyzed the samples. This enabled defendant to explore any possible effect Mr. Churchman's methods of collection might have on the reliability of results.

For the foregoing reasons, this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 15:

By this assignment defendant contends that it was error to allow into evidence a photograph of his pickup truck. He urges that the photograph was irrelevant and prejudicial.

The use of photographs as graphic portrayals of oral testimony has long been recognized. A photograph becomes admissible when a witness has testified that it is an accurate representation of what was personally observed by that witness. *State v. Moore,* 419 So.2d 963 (La. 1982). Photographs have been held admissible to establish the connexity between the evidence and the facts of the case at issue. The test of admissibility is whether the probative value of the photograph outweighs any possible prejudice which might result from its display to the jury. 419 So.2d at 967.

In this instance, the photograph of defendant's pickup truck was relevant because it proved useful in corroborating testimony of Lt. Jones as to why suspicion focused on defendant. The photograph cannot be said to be prejudicial in and of itself. The record clearly reveals that Lt. Jones pursued the identity of the driver of the pickup truck, observed by the victim some two weeks prior to the instant offenses, merely as a possible investigative lead. We do not find admission of that photograph confused the jury concerning the issues to be determined.

The trial court has wide discretion in determining the relevancy of evidence, and its discretion will not be overturned absent a clear abuse of discretion. *State v. Albert,* 430 So.2d 1279 (La. App. 1st Cir. 1983), *writ denied,* 433 So.2d 711 (La. 1983). We find no such abuse and therefore no merit in this assignment of error.

ASSIGNMENTS OF ERROR NOS. 2, 13, 14, 18, 19, 20, 21 and 22:

By these assignments defendant contends that numerous state exhibits were introduced into evidence without laying of a proper foundation or chain of custody.

Demonstrative evidence can be admitted into evidence only after it is shown that, more probable than not, the evidence is connected to the case. That foundation can be laid by establishing a chain of custody of the evidence or by visual identification. Once that foundation is established, the weight to be given the evidence is a question for the jury. *State v. Lucky*, 453 So.2d 1234 (La. App. 1st Cir. 1984), *writ not considered*, 459 So.2d 529.

Moreover, showing of a continuous chain of custody is not essential to the introduction of physical evidence as long as the evidence as a whole establishes that it is more probable than not the same object originally seized. Deficiencies in the chain of custody are also attributable to the weight of the evidence, not its admissibility. *State v. Bridgewater*, 450 So.2d 1075 (La. App. 1st Cir.) 1984).

Review of the record convinces us that all disputed items were shown to be more probably than not connected with this case.

Clothing worn by defendant when arrested was introduced into evidence based on identification by Lt. Duane Jones, who was present when defendant was arrested, and testimony of the victim that the shirt and socks were similar to those worn by her assailant.

James Churchman testified that he collected hair and saliva samples from defendant and prepared the written

request for their analysis. These were delivered to Shirley Phillips, who testified that she performed the analytical tests on these samples. Both Mr. Churchman and Ms. Phillips are employees of the Louisiana State Police Crime Laboratory.

Ms. Phillips also testified that she received the rape kit in globo and performed the serological testing of its contents. This kit was prepared by Dr. Randall Brown, who identified it in globo. The kit was delivered to the Louisiana State Police Crime Laboratory by Lt. Duane Jones, who was present at the hospital when the kit was prepared.

Dr. Carl E. Blunck, III, a deputy coroner, testified that he drew a blood sample from defendant in the presence of Lt. Duane Jones. The envelope and vial, which he visually recognized, were delivered to Lt. Jones, who testified that he thereafter delivered the sample directly to Shirley Phillips, who presented the serological results. Both Dr. Blunck and Lt. Jones also witnessed the authorization to draw a blood sample signed by defendant.

Crime scene investigation was conducted by a team which included Lt. Paul Maranto, Jr. and Sgt. Richard Crochet. Sgt. Crochet delivered latent fingerprints lifted from the scene to the State Police Crime Laboratory, and Carol Richard, who performed latent fingerprint analysis, recognized the envelope and her handwriting. In addition, a window screen recovered from the scene was delivered to the District Attorney's office by Sgt. Crochet a few weeks before trial.

In this context, defendant also urges that evidence from the Louisiana State Police Crime Laboratory should not have been admitted because the state failed to offer certificates of analysis authorized by LSA-R.S. 15:499, 500, and 501. A new basis for objection cannot be raised for the first time on

appeal. *State v. Fowlkes*, 352 So.2d 208 (La. 1977). Moreover, these statutes provide for proof of criminal laboratory findings by certificate of the person in charge of that laboratory only as an alternative method and not as an absolute prerequisite.

For the foregoing reasons, these assignments of error are without merit.

ASSIGNMENT OF ERROR NO. 17:

By this assignment defendant contends that the trial court erred by allowing introduction into evidence of a motion and order which compelled defendant to submit to taking of blood, saliva and hair samples. Defendant argues that the motion was irrelevant and tended to mislead the jury into thinking that a tribunal had already determined defendant's guilt.

We find that the motion was relevant as tending to lay a foundation for introduction of the sampling that it authorized. Moreover, its contents clearly indicate that defendant had only been arrested and charged with the instant offenses, such information was independently within the jury's knowledge.

We find no abuse of discretion and therefore no merit to this assignment of error.

For the above and foregoing reasons, the convictions and sentences are affirmed.

AFFIRMED.

APPENDIX B

COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

STATE OF LOUISIANA	**No. KA 84 1290**
VS.	**Parish of**
JAMES HENRY KIRKLEY	**East Baton Rouge**

On Application for Rehearing.

Rehearing DENIED

Baton Rouge, Louisiana June 27, 1985

/s/_____
Watkins, J.

/s/_____
Crain, J.

/s/_____
Alford, J.

Filed June 27, 1985

/s/_____
Stanley P. Lemoine, Clerk

APPENDIX C

THE SUPREME COURT
OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS. **NO. 85-K-1426**

JAMES HENRY KIRKLEY

IN RE: Kirkley, James Henry; Applying for Writ of Certiorari and/or Review, Stay; to the Court of Appeal, First Circuit, Number KA-84-1290; Parish of East Baton Rouge 19th Judicial District Court Div. "C" Number 3-84-388

July 22, 1985

Stay order denied.

/s/ HTL

/s/ PFC

/s/ JLD

/s/ FAB

Supreme Court of Louisiana

July 22, 1985

/s/ Frans LaBranche, Jr.
Clerk of Court
For the Court

APPENDIX D

THE SUPREME COURT
OF THE STATE OF LOUISIANA

STATE OF LOUISIANA

VS. **NO. 85-K-1426**

JAMES HENRY KIRKLEY

IN RE: Kirkley, James Henry; Applying for Writ of Certiorari and/or Review, Stay; to the Court of Appeal, First Circuit, Number KA-84-1290; Parish of East Baton Rouge 19th Judicial District Court Div. "C" Number 3-84-388

October 4, 1985

Denied.

HTL

JAD

PFC

WFM

JLD

FAB

JCW

Supreme Court of Louisiana
October 4, 1985

/s/ Frans LaBranche, Jr.
Clerk of Court
For the Court

APPENDIX E

STATE OF LOUISIANA	**No. SO 84-7777**
VS.	**SHERIFF'S OFFICE**
James Henry Kirkley, WM,	**Parish of East Baton Rouge**
DOB: 7/8/58	
La. D.L #4106651	**Lt. Duane T. Jones**
	Detective Division
AT LARGE	**389-5061**

AFFIDAVIT

The above-named person was accused with having violated L.R.S. 14:42 and 14:60 titled Aggravated Rape & Aggravated Burglary by Lt. Duane T. Jones, East Baton Rouge Parish Sheriff's Office who was duly sworn by me and did state:

That between 5:30 A.M. and 7:30 A.M. on March 13, 1984, within this State and Parish, accused did make an unlawful entry into an inhabited dwelling at 5440 Cherrywood, Baton Rouge, Louisiana, while armed with a dangerous weapon: to wit a folding knife and committed vaginal sexual intercourse where the victim, Marion Miller, was prevented from resisting the act because the accused was armed with a dangerous weapon.

Affiant informs the Court that on March 13, 1984, he had the occasion to investigate the above offenses. During the course of the investigation, Lt. Paul Maranto developed and lifted several latent prints from the scene of the above offense, some of which were lifted from the point of entry, being the north-east dining room window, said latent prints were subsequently submitted to Louisiana State Police Bureau of Identification, the name of the accused was mentioned.

Subsequent comparison of the accused's fingerprints, which were on file at Louisiana State Police with the latent prints lifted at the scene were positively identified as the prints of the accused by Carol Richard, Latent Fingerprint Examiner, Louisiana State Police Bureau of Identification.

Richard informed Lt. Paul Maranto that she had positively identified the right thumb print of the accused with one of the latent prints lifted from the exterior edge of the window screen from the north-east window, which is the point of entry.

Complainant requests that a warrant for the arrest of the accused be issued.

/s/ Lt. Duane T. Jones

Sworn to and subscribed before me this 13th day of March, 1984.

/s/ Donovan W. Parker
Ex-Officio Notary & Deputy Clerk of Court
Parish of East Baton Rouge

WARRANT OF ARREST

State of Louisiana
Parish of East Baton Rouge

To the Sheriff or any Peace Officer:

Complaint has been made before me, upon oath of Lt. Duane T. Jones, East Baton Rouge Parish Sheriff's Office charging James Henry Kirkley, WM, DOB: 7/8/58, La. D.D. #4106651, AT LARGE with Aggravated Rape R.S. 14:42 & Aggravated Burglary R.S. 14:60.

You are hereby commanded, in the name of the State,

to arrest and bring the accused before our Court to answer the complaint. You are further commanded to keep the accused in custody until released according to law, and this shall be your warrant.

Given under my official signature this 13th day of March, 1984.

/s/ Donovan W. Parker
Judge Nineteenth Judicial District Court of Louisiana

APPENDIX F

INDICTMENT

THE NINETEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

STATE OF LOUISIANA
VERSUS
JAMES HENRY KIRKLEY
5433 Loranger
Baton Rouge, Louisiana
W/W DOB 7-8-58
No. 3-84-388 Sec. II

Filed March 14, 1984
/s/ Jeanne Lieux
Deputy Clerk

Count I -
Aggravated Burglary
Count II -
Aggravated Rape

A TRUE BILL
By: /s/ Elvin O. McGee
Foreman

On this the 14th day of March, 1984, the Grand Jury of the Parish of East Baton Rouge, State of Louisiana, charges that on or about the 13th day of March, 1984, at and in the Parish, District and State aforesaid, James Henry Kirkley committed the offense of Count I - Aggravated Burglary, Count II - Aggravated Rape as defined by Louisiana Revised Statute Title 14; Article 60, 42 in that Count I - he committed aggravated burglary of a dwelling at 5440 Cherrywood Street, Baton Rouge, Louisiana, belonging to Marilyn, Miller, Count II - he committed aggravated rape upon Marilyn Miller, contrary to the law of the State of Louisiana and against the peace and dignity of the same.

/s/ Dennis C. Weber
Assistant District Attorney
Nineteenth Judicial District of Louisiana

Walton Barnes, II
msb

APPENDIX G

STATE OF LOUISIANA	**Number No Bill Section II**
VERSUS	**19th Judicial District Court**
JAMES KIRKLEY	**State of Louisiana**
	Parish of East Baton Rouge

MOTION TO SUPPRESS LINE UP IDENTIFICATION BOTH PHYSICAL AND PHOTOGRAPHIC

Defendant, through undersigned counsel, moves this Honorable Court for an order suppressing the use of any identification of the defendant by the victim resulting from a physical line up conducted at 10:07 P.M. on March 13, 1984, at the East Baton Rouge Parish Prison, for the following reasons:

1.

Robert Matthews, the representative from the Office of Public Defender, was not allowed to be present when the victim, Marion Miller, made her decision known reference whether she had or had not identified anyone person in the line up.

2.

Defendant was arrested for aggravated rape and aggravated burglary on March 13, 1984.

3.

Folowing the victim observing all the persons in the line up, she did not make a selection and said something to the effect that, "I wish I had more time", or words to that effect.

4.

After the line up, the victim, Ms. Marion Miller, about

six or seven police officers (names Unknown) and Robert Matthews went to another room to see who the victim had picked, if indeed she could.

5.

While Robert Matthews was standing in the room waiting for the victim to make her decision known by marking and signing the line up card, he was informed by Assistant District Attorney Dennis Weber "that it was nice of him to come and they would let him know what happened", and asked to leave the room.

6.

Robert Matthews told Mr. Weber and Lieutenant Jones that he wanted to remain in the room with the victim to see if she made an identification.

7.

Lieutenant Jones told Robert Matthews they would let him know what happened and ordered Robert Matthews to leave the room.

8.

Robert Matthews left the room. The victim, all the officers, and Mr. Weber remained inside the closed room with the victim and talked with her for approximately three (3) minutes.

9.

Robert Matthews could not hear the conversations but he observed the about conversations through the glass in the closed door.

10.

Later, Mr. Weber took the victim to an adjoining room in the back. About a minute or so later, Mr. Weber came out-

side and told Robert Matthews that the victim had picked number two (2), the defendant, as her attacker.

11.

Robert Matthews never heard the victim make a verbal identification. Robert Matthews never saw the victim sign the line up card.

12.

The victim expressed her opinion concerning the line up participants in the presence of law enforcement officers and the District Attorney's Office, but in the absence of the representative from the Public Defender's Office who had been ordered not to be presence in the room by Lieutenant Jones/ law enforcement personnel.

13.

Therefore, the line up and any subsequent identification are constitutionally deficient, all in violation of the United States Constitution, 6th Amendment, and Louisiana Constitution of 1974, Article 1, Section 13.

14.

This Court is asked to suppress the use of the physical line up of March 13, 1984, and any photo line ups, and any subsequent identification of the defendant for use at the trial on the merits or any prior judicial proceedings.

Respectfully submitted:

/s/ Leon D. Jackson
Assistant Public Defender
The Office of Public Defender
Alton T. Moran - Director
123 St. Ferdinand Street
Baton Rouge, Louisiana 70801
Telephone: (504) 389-3150

ORDER

Considering the foregoing motion:

IT IS ORDERED that James James Kirkley be granted a hearing herein and that same be heard on the 4th day of April, 1984, at 9:30 o'clock, A.M., contradictorily with the State of Louisiana.

DONE AND ORDERED at Baton Rouge, Louisiana, this 19th day of March, 1984.

/s/ Donovan Parker
Judge, 19th Judicial District Court

CERTIFICATE

I certify that a copy has been sent to Section 2, District Attorney's Office, 5th floor, Governmental Building, 222 St. Louis Street, Baton Rouge, LA., this 15th day of March, 1984.

/s/ Leon D. Jackson
Assistant Public Defender

APPENDIX H

ROBERT MATTHEWS, called as a witness on behalf of the defense, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BARNES:

Q Mr. Matthews, would you give us your full name and address, please?

A Robert L. Matthews, 1467 Curtis Street, Baton Rouge, Louisiana.

Q All right, sir and you are occupied, how?

A As an investigator for the Office of the Public Defender.

Q Pursuant to that investigation - pursuant to that, uh, uh, employment were you contacted on or about March 13th, 1984 relative to a lineup that was being conducted concerning a subject by the name of James Kirkley?

A Yes, I was.

Q And you were working for the Public Defender at that time; were you?

A Yes.

Q Do you recall approximately what time it was that you received a call relative to the lineup that was to be conducted?

A Approximately 8:25 p.m.

Q All right; you were at home at that time?

A Yes, sir; I was.

Q And what were your instructions received?

A Uh, to go to the Parish Prison and represent James Kirkley in the lineup for the Office of the Public Defender.

Q And did you do so?

A Yes, I did.

Q Approximately what time did you arrive at the Parish Prison?

A Uh, around 10:07 p.m. Uh, I don't know exactly. I have to look at my notes to see what time I arrived. I don't have the time I arrived there but the lineup actually started at 10:07 p.m.

THE COURT: So you must have got there before 10:07 then, right?

A Oh, yes, I did.

THE COURT: Okay.

BY MR. BARNES:

Q Approximately how long had you been there before the lineup itself?

A Uh, about a hour.

Q All right. And did you participate any in selecting any individuals to appear in that lineup?

A Yes, I did.

Q All right, and can you tell us how many individuals were selected?

A Uh, six.

Q It was Mr. Kirkley was one of the six; was he?

A Yes, he was.

Q What - can you explain for the record now what set up there is at Parish Prison for these lineups? Is there a particular room where they're conducted or anything of this sort?

A Yes, there is a room where they're conducted.

Q Approximately how large is the room?

A I guess it's about - it's about the size of this courtroom.

Q Now, in - in the physical setup what is there?

A Well, they uses the library and you gots books, uh, on the shelves there and they have benches and they have weights what the inmates use to exercise with.

Q Is there a stage or a lifted platform in that room?

A Yes, there's a stage there.

Q Is - are the participants put on this stage for the purpose of the lineup?

A Yes, they are.

Q Okay. Now, are there any other rooms that would be adjacent to what I will refer to as the large room where the lineups are conducted?

A Uh, no; not as I know of.

Q All right, are there any interview rooms in the vicinity of the larger room at Parish Prison?

A Yes, right across the hall.

Q Can you describe those rooms for us?

A Uh, they two small rooms. I think they about, uh, eight by ten or something like that and they have a table and a couple of chairs in there.

Q In each one of these rooms?

A Yes.

Q Okay. Now, do you recall who the officer in charge of that lineup was?

A Uh, a Lieutenant Jones.

Q Now, was there a representative of the D.A.'s office at the lineup?

A Uh, yes; Mr. Weber.

Q Would that be Dennis Weber?

A Yes, right.

Q All right. Now, how was the lineup conducted in this case?

A Well, uh, we, uh, took the, uh, defendant to the, uh, lines, uh, dormitories and he selected the people that he wanted to participate in the lineup with him to give him that choice. Uh, after we selected five people to participate in the lineup with him we came back up front to the room where the lineup was actually going to be held and then gave him the choice of picking whatever number that he wanted to wear during the lineup.

Q All right, now, were you present during the entire procedure?

A Yes, I was.

Q All right, and there was a representative of the D. A.'s office during this entire procedure?

A Uh, he - he may have been out of the room, but Mr. Jones was conducting the lineup.

Q All right, he was with the sheriff's office?

A Yes, sir.

Q All right. And that would be Dewayne Jones?

A Right.

Q Okay. Now, after the persons were selected you indicated that Mr. Kirkley picked a number.

A Yes.

Q All right, was Mr. Jones present when that number was picked?

A Yes.

Q Okay, and what happened then.

A After everybody picked a number they put them in a lineup, they took pictures of them and then, uh —

Q Who is, they? You said they took pictures. Who took the photographs?

A Uh, I don't know who it was that took the picture. It was somebody from the police department.

Q Okay. All right, what happened after they were photographed?

A Okay, Mr. Jones and I went to - up front where the victim was and instructed the victim how the lineup was going to be held.

Q All right, now. You said you went up front. Was the victim in the same - what I'll refer to again as the large room where the people were standing?

A No.

Q Where was she?

A She was, uh, at the front of the, uh, Parish Prison she come in, uh, where the warden's office was up there.

Q All right, could she - from where she was at that point

could she have seen any of the individuals that were chosen for the lineup?

A No, she couldn't have.

Q Okay, so you and Dewayne Jones went to where she was?

A Right.

Q Out of the sight of the people that had been chosen?

A Right.

Q Okay, now what instructions did the alleged victim receive in this case?

A Uh, he told her that each one would be wearing a number, each one would be requested individually to step out and say something, then they would be instructed to turn around and then step back and she would view it and if she could pick out any of those individuals she ought to write the number of the individual that she thinks was the accused. Uh, and they told her that she - she wouldn't be - they wouldn't be able to let her in there but if she couldn't identify anybody to put none of those and then we came into the room together with her.

Q All right, now, where - while the lineup procedure was going on where was she standing in relation to the six individuals on the platform of the stage?

A Okay, she was standing behind the screen. They had let a screen down and she was looking through a glass - it's a glass - that little platform they had her to step up on and while she viewed them - like I said, told number one to step out and gave him instructions to turn around and say, uh, put your hands on minds - or whatever they told them to say.

Q Okay, could - can you tell us approximately how far she

was from these individuals - the six people on the platform?

A I'd say about fifteen to twenty feet.

Q Okay, and where were you standing in relation to the people that were on the platform?

A I was right beside her sitting on the bench.

Q Okay, she was standing and you were sitting next to her?

A Um-hum.

Q Did she have a card in her hand at that time to mark the number?

A Yes, a card in her hand.

Q All right had you been through any lineup procedures before this lineup?

A Yes, quite a few.

Q All right. Is it customary to give the alleged victim the card to hold while they are making the view?

A Uh, yes.

Q All right, now, can you describe that card or the form of the document that she would have had upon which she was suppose to indicate her, uh, decision?

A Yes, it was a plain white card. It was about that long and about that wide.

Q All right, will that reflect that you've indicated about three inches by five inches? Would that be about right?

A Yes, sir.

Q All right, now, I think we were at a point where number one was stepping forward saying the phrase instructed and turned around and stepped back?

A Um-hum.

Q All right, now what happened to number two?

A Uh, nothing, uh, particularly. They went through with all of them. Nothing happened particularly with him during the lineup.

Q All right, did you hear everything that was said by all six participants on the stage?

A Yes.

Q Was there any interruption of the lineup process to your knowledge?

A No.

Q Uh, specifically do you recall any interference with the voice portion of the lineup by any, uh, airplane noise or takeoff or landing of a jet at Ryan Airport or anything of this effect?

A No.

Q All right, after the procedure was gone through by all six of the individuals what was Mrs. Miller's - or Ms. Miller's reaction to that?

A She asked them could they have them to go through it again and, uh, they went through it again starting from number one.

Q All right, they went through the whole procedure again?

A Yes.

Q Including voice identification?

A Right.

Q All right, did Ms. Miller indicate anything to you that, uh, showed indecisiveness relative to her choice?

A Uh, not at that time. Once she got back in the room, yes.
Q Okay.

MR. ERWIN: Now, this is at - in - while she's still viewing?

MR. BARNES: Your Honor, I'm conducting the direct.

MR. ERWIN: I'm trying to —

MR. BARNES: I will complete it.

MR. ERWIN: Well, he gave you two different answers. Will you ask the question again, then?

BY MR. BARNES:

Q All right, I believe the question was to the effect did Ms. Miller indicate any indecisiveness as a result of the lineup procedure?

A Well, not at that time.

MR. ERWIN: Okay, I got you.

Q Was she the one that requested that they go through the lineup procedure again, the stepping forward —

A Yes, she was.

Q — talking, turning around and going back?

A Yes.

Q Now. All right, after the second repeat of the lineup procedure what was Ms. Miller's reaction then?

A Uh, they told her to step down, left out of the room, they went to another office adjacent to the, uh, I think central control. I was still with her, uh, Lieutenant Jones was with her and Mr. Weber was with her.

Q It was the three of you?

A Uh, yes. Well, there were quite a few officers. About a dozen officers altogether. Lots of them was working there that night.

Q Had you ever seen that many officers at a lineup before this?

A No, not that many.

Q All right, so you went to some other room adjacent to —

A The central control.

Q Okay, well, did Ms. Miller say anything at that time?

A Well, when we went in the room she sat at a table with a pen and the card.

Q Had she marked on the card before?

A No, she hadn't marked anything.

Q All right.

A It was - it appeared that she was undecided as to what to do.

Q Well, why do you say that?

A Because she was just sitting there and she wasn't - wasn't writing anything.

Q Did she say anything to anybody?

A No, she was looking at it. So when she started to write Mr. Weber said, well, hold up, just a minute. Uh, and he told me, say, nice of you to come, thank you. I said I want to remain here to see if she can make an identification. He said, well, we'll tell you what happened and he pointed towards the door and I went outside. They closed the door. I couldn't hear whas was going on but I —

Q At this point did Mr. Weber tell you to do anything else?

You indicated he told you that they would let you know what happened, thinks for coming.

A Yeah, right.

Q Did he indicate anything else to you?

A Not at that time.

Q Okay. All right, so you left the room after he showed you the door?

A Right.

Q All right and what did you do at that time?

A I stood outside the door because I could still see inside because it's all glass there and, uh, the officers and Mr. Weber and the other officers converged on her and they were standing around her talking to her. I couldn't hear what was going on.

Q They were all still in the room?

A Right.

Q Approximately how many officers were in there with her at that point?

A Uh, about eight or nine.

Q Okay, now, from where - from your vantage point, looking through the glass, could you actually see Ms. Miller or were you seeing just officers?

A I couldn't see her because they was - they were around her talking to her.

Q Okay.

A And, uh —

Q Approximately how long did that go on?

A That lasted about two or three minutes then Mr. Weber took her in a back room adjacent to that room and, uh, stayed back there about a minute or so and he came outside where I was and I say, well, what happened. He say, she picked your man, she picked number two. He say the reason why I took her in the back just to make sure about the identification. I wanted to get her away from the other - the other people.

Q Did you know which officers those were that were in the room - the first room with, uh, her and Mr. Weber?

A Uh, I really know them when I see them. It was a lot of them that were actually working that were on duty at the Parish Prison but they were back there - they stayed back there.

Q All right, was Mr. Jones one of those officers?

A Yes.

Q All right, do you know by name any of the other officers that were in there?

A No, I don't.

Q All right. All right, now, after you talked to, uh, Mr. Weber when he came back out of the room and you - informed you that the alleged victim had picked Mr. Kirkley, now did you attempt to question him about any of the procedures subsequent to that?

A Uh, no, I didn't. I just made a record of what happened. I went back and reported to my supervisor.

Q All right, did you ever request permission to stay in the room to see her actually mark the card?

A Well, yeah, I told Mr. Weber I wanted to, uh, stay in there. At that time I didn't really know - I thought Mr. Weber

was a - was a detective or police officer. I didn't really know that he was from the D. A.'s office. Mr. Jones told me that later on that night.

Q All right. And you - he still maintained that he would let you know?

A Yeah, that's right.

Q Did you ever see, either at the time of the actual lineup itself or in the room where you did have view by the glass, did you ever see Ms. Miller mark the card in any manner?

A No, I didn't.

Q Did you ever see her sign the card or do anything with it at all or make any notations on it?

A No.

Q Did Ms. Miller in your presence ever make any verbal identification?

A No, she didn't.

Q What time did you leave the prison that night?

A Uh, approximately 10:42.

Q All right, how long did the lineup procedure itself take?

A I don't really know.

Q All right. That's all I have. Answer the questions that Mr., uh, Ervin (sic) may have.

CROSS-EXAMINATION

BY MR. ERWIN:

Q How many lineups have you participated in?

A I don't know. It's quite a few.

Q Ten, a hundred and ten or somewhere in between there?

A Maybe twenty - twenty-five.

Q Twenty-five. And at whose request are you called out?

A Uh, well if it's someone from my section of court, uh, the officer will call the Public Defender's Office and say we're having a lineup on such-and-such a one and whatever section it is that investigator goes out.

Q And do you know is that generally before or after a bill of information or bill of indictment has been filed?

A Well, most of the time it's when he's first arrested.

Q First arrested?

A Um-hum.

Q So it's nothing unusual that went on in this instance, then, up until the time you were called, that you know of?

A Not as I know of.

Q You went out there on the normal everyday lineup circumstance?

A Uh, well, normally - see, this is not my section of court.

Q Um-hum.

A However, the officers called the director of the Public Defender's Office. Since I was the closest to the jail he told —

Q They called you.

A — he told me to go and represent Mr. Kirkley.

Q And what was happening when you got there?

A Uh, they was waiting on the, uh, victim to come. She had never came and some of the officers had never showed

up so Mr. Jones and myself went with Mr. Kirkley to pick out the other participants.

Q. Mr. Kirkley picked out the other participants in the line-up; is that correct?

A Um-hum; yes.

Q Was he satisfied with his choices?

A Well, I'm sue he was. It was left totally up to him.

Q Did he ever tell you, uh, that I'm not satisfied with the people I picked?

A No.

Q You were his representative there; were you not?

A Right.

Q Were you satisfied?

A I was satisfied if - if - if he was satisfied I certainly was.

Q Um-hum. During the conducting of this lineup and the picking of the people, the actual conducting of the lineup, Ms. Miller was nowhere around, was she? I mean, the picking of the people.

A No.

Q She didn't see Mr. Kirkley at any time prior to the lineup?

A To my knowledge, no.

Q In your opinion was there anything unduly suggestive about this lineup?

A In my opinion?

Q From the time she viewed it until the time the lineup was over, not until the time - we're going to get to the other part later when you said you were excused.

A No, not to my knowledge.

Q You've been at twenty or twenty-five lineups probably in your life.

A That's right.

Q Was this one conducted any differently than those?

A Not the lineup itself.

Q That's what - that's where we are right now.

Q What were the participants wearing in the lineup?

A They were all wearing the orange uniforms - jail uniforms.

Q And do you know why that came about?

A Well, that's what they are to wear. The other guy was in jail and he had been arrested so he had to wear the same thing as the rest of them.

Q And that was to ensure that at the lineup he would look or be in the same clothes that the other people were in?

A Yes.

Q So as not to point a finger at him, so-to-speak?

A Right.

Q And what about their feet? What did they have on their feet?

A Most of them had slippers.

Q Most of them had slippers. Are you sure about that when the lineup was conducted?

A No, I'm not sure.

Q If I told you they were all barefooted would that refresh your memory?

A Maybe so. They may have - they may have pulled them off but I know they - they came up there with slippers on.

Q Were you able to see the lineup as it was conducted while they were on the stage?

A Yeah, I saw them while they were on the stage.

Q Let me ask you if you ca nlook at either of these pictures and see if it accurately reflects what you saw there that night.

MR. BARNES: I assume, counsel, that those are the same photos that have been shown previously.

MR. ERWIN: You've already seen those.

A Yes.

BY MR. ERWIN:

Q All right, so they are barefooted?

A Yes.

Q All right, do you remember that now?

A Okay, well, what happened is they - they - they made them probably take off their shoes after I - we left to go and get the victim, you see. Now, once they come back inside, uh, I focused my attention solely on the victim and the officer directing the questions.

Q Do you know why they were made to take off their shoes?

A No, I don't.

Q You don't have any idea?

A No.

Q You testified that during the lineup procedure everyone

was required to do exactly the same thing; is that correct?

A Yeah.

THE COURT: Speak up, please. You said yes?

A Yes, sir.

Q And still up to that point there is nothing unduly suggestive about this lineup?

A Not to my knowledge, you know.

Q And they went through it again?

A Yes.

Q At Ms. Miller's request - the victim?

A Right.

Q Did she ever indicate at that time that she wanted them to go again because she wasn't sure?

A Uh, after the offense the first time, she stood there and hesitated and so the officer say, you want them to do it again, she said, yes, could they - could they do it again.

Q Have you ever seen that done at a lineup before?

A Uh, yes.

Q How many times?

A Uh, maybe a couple of times at least.

Q Nothing unusual about it is it?

A No, I wouldn't think so.

Q At that point was Mr. Kirkley asked to do anything different than anybody else?

A No, not to my knowledge.

Q And you testified that there was a lot of - or there were a lot of officers present.

A Um-hum.

Q Uh, some of them were jail personnel, I think and some of them were probably detectives involved. Would that be fair to say?

A Right.

Q Pretty confusing situation at that time?

A Yes, I would say.

Q And were those officers asked to leave by you?

A No, they wasn't.

Q Had you ever seen that many officers present before at a lineup?

A Well, not quite that many, no.

Q Have you had any special training in lineup procedures or counseling or anything?

A No.

Q You just - you're an investigator for the Public Defender's Office and you went out there to see what happened?

A Well, not just to see what happened. Uh, I - you know, I know what rights he's entitled to and I know how the lineup is supposed to be conducted.

Q All right, now the - that's - you have had some training or some knowledge of that anyway?

A Well, uh, no, I - I haven't been trained or anything like that.

Q Well, where did you learn this; on the job?

A Yes.

Q In your experience on the job was this lineup up until this point conducted correctly?

A Uh, I would say so.

Q Anything unusual about - well, not anything unusual - but is it possible, uh, or have you seen a victim be hesitant about picking someone?

A Yes.

Q Have you seen them think about it for awhile?

A Yes.

Q And then they decided?

A Yes. I was always allowed to remain present.

Q Well, just answer those questions right now. Have you seen that happen?

A Yes.

Q In this instance you testified that when she came out of the room after viewing them the second time she still hadn't picked anybody out?

A No, she didn't write anything.

Q So there's nothing unusual about that because from your own testimony you've seen that happen before?

A No, no. Not that.

MR. BARNES: I realize, Your Honor — Excuse me. I'm making an objection here. I realize that the man is under cross-examination. But I'm confused now as to what point in time counsel is referring to. Are we still on the stage or have

we gone back to the little rooms now and rather than run the risk that the record will be confused I would like to request the Court to request this —

MR. ERWIN: Same problems I had with your questioning awhile ago.

THE COURT: Well, I don't see any valid basis for your objection at this point. Objection overruled.

MR. ERWIN: Well, I'll clear it up anyway.

BY MR. ERWIN:

Q When she came out of the room after viewing the lineup she still hadn't marked anything on her card?

A No, she hadn't.

Q And I'm asking you had you seen that in other instances?

A No, I haven't. Either when they come out they either write none of these or they write number one looks like him or number one is or whatever.

Q Every lineup you've ever been to, that's happened? They don't sit and think about it or they don't go somewhere else and think about it?

A Uh, no. They - they simply go in the room and we stay there and they either write the number that they think was him or is him or they said none of those.

Q All right, and she didn't do that?

A No.

Q And y'all walked out of the lineup room?

A Yes.

Q That's when the confusion was?

A Yes, right.

Q And what took place?

A Well, we went in this office that is adjacent to what I call the central control. Uh, she sat there and then some officer was already in there and some more came in and she was just sitting there and then she attempted like she was fixing to write something but he said, well, just hold up.

Q You're talking about Mr. Weber now?

A Yeah.

Q All right, at any time when any of those other officers were in there, did you ever hear or see anybody do anything to suggest to Ms. Miller who to pick out?

A Not while I was in there.

Q Well, that's what I asked you. Certainly you couldn't have seen or heard it if you weren't there. At the time you were there did you ever see or hear anybody do that?

A No.

Q Did anybody say it was Mr. Kirkley or did anybody say the victim was - I mean, the defendant was in the lineup or anything like that?

A No.

Q And at some point in time Mr. Weber asked you to leave?

A Yes, sir.

Q And he was left in the room by himself with Ms. Miller?

A Oh, no. Like I say, it was about eight or nine officers back there in that room.

Q Well, when did they get to the room Mr. - well, when did he ask you to leave? Who all was present then?

A Uh, they - that's who was present. It was about eight or nine of them. I didn't - I don't know who they were but they was just standing around in there and the coffee pot is back there, too. Uh, and when she attempted to - like she wanted to mark something on the card, he say, well, just hold on, wait a minute. And, uh, he say, well it's nice of you to come. He said, thank you, we appreciate you coming. I said, well, I want to stay here until I see if she's going to make an identification. He said, well, we'll let you know what happened and gestured to the door. So I went outside and then he closed the door.

Q And they left all those officers back there?

A Yeah. Like I say —

Q All right.

A — several of them got around her and they were talking to her. I couldn't hear what they were saying. I couldn't even see her then.

Q Um-hum.

A Then Mr. Weber took her in the room in the back in the adjacent room —

Q By himself?

A By himself; yes. Then, uh, he came outside and told me, he said - I said, well, what happened. He said, well, she picked your man. She picked number two. He said the reason why I took her in the back was to get her away from the other officers to be sure - to ask her was she sure about her identification

Q Did he say anything about whether or not he was trying to get her away from all the confusion?

A No, he didn't.

Q He just said that so she could be sure about her identification?

A Yes.

Q What did that mean to you?

A I - I don't know what it meant. Uh, I made a record of what happened, took it back to my supervisor and left it with him.

Q So at that point you were apprised of who had been picked out of the lineup?

A Right.

Q Well, you were aware of nothing unduly suggestive or had gone on from what your - your own personal knowledge?

A My own personal knowledge, no.

Q Okay, that's all the questions I have.

REDIRECT EXAMINATION

BY MR. BARNES:

Q All right, well, let's clear up one thing. The lineup was conducted from what I've referred to as the large room; is that correct, Mr. Matthews?

A Right.

Q And the lineup procedures that you've been involved in, is that the room where the notations are made on the card

when the identification, if any, is made by a purported victim?

A Yeah, usually they make them right there.

Q Have you ever been asked to leave a lineup before?

A No.

Q Thank you.

APPENDIX I

DENNIS C. WEBER, called as a witness on behalf of the defense, after having first been duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. BARNES:

Q You're Dennis Weber, is that correct?

A Yes.

Q You're a representative of the district attorney's office, correct?

A Correct.

Q You were so employed on March 13th, 194?

A Yes.

Q Mr. Weber, you and I talked about this case several times I believe and I want to focus in on conduct that occurred after a lineup had occurred on that date, March 13th, 1984, okay. Do you recall what time that lineup occurred?

A Approximately nine o'colck at night, Tuesday night.

Q All right and the lineup procedure was repeated; is that correct?

A I don't understand your question.

Q Did the alleged victim in this case request that the persons participating in that lineup go through the procedure again stepping forward, giving a voice identification, turning around and stepping back?

A That's correct. There was a jet that flew over just about

the time that somebody in the lineup was making some - was saying some words, put your hands on mine. Uh, after the whole procedure had been completed the first time the young lady requested that number two be asked to say the words again and at my instructions I asked Officer Jones for all persons in the lineup to repeat all the words again.

Q After that lineup was conducted did you go to a separate room behind the central station there at the Parish Prison?

A That's correct.

Q Had Ms. Miller marked her card before she went to that room?

A Not to my - no, sir - no, sir.

Q All right, at the time that you were in that room who else was present?

A I was in the room. There was a control room directly or - or adjacent to - to this office that we were in. Uh, there Were several police officers and a representative from the Public Defender's Office in that room and - and in - in an adjoining office toward the front of the parish jail, uh, the victim's father and Lieutenant Jones was in - in that room.

Q All right, at the time that you all entered that first room would that be the one that has the glass window?

A Correct. There's a glass window that divides the control room from the office as well as the door.

Q Was Robert Matthews - strike that - do you know Robert Matthews who is an investigator of the Public Defender's Office?

A Yes.

Q All right, was he in that room; the one with the glass window at anytime?

A Where the victim and myself were located?

Q Yes, sir.

A No, sir; he attempted to come in the room along with other police officers and I had instructed everyone, uh, to remain outside because the people were pressing the lady. They were pushing - not necessarily pushing on her physically, but they were pressing behind her, they were anxious to - for her to make a decision and I felt that it was in everybody's best interest, including your client, that the victim have an opportunity to collect her thoughts, sit down quietly by herself and to determine if in fact she could make an identification.

Q So you - did you ask the representative of the Public Defender's Office either to leave the room or not to come in that room?

A Yes, sir; I asked him as well as, uh, Captain Carson Bueto and Officer Steve Weber. They were all three attempting to get in the room at the same time and I asked all three gentlemen please to remain outside.

Q How long was it after you were in that room that Ms. Miller finally made any notations on the card or the sheet that was provided to her to make identification?

A I positioned myself - I - I can't answer you that question. Mrs. Miller sat down at a table or at a counter, she had a pencil in her hand and she had a piece of paper that she had been given prior to the lineup by Lieutenant Jones. Uh, I told the young lady to sit down and collect her thoughts and - and - if - if she had some notations to make to take her time and make her notations. I positioned

myself at the opposite wall to her back and quite frankly I wasn't watching as to how much - whether she made a notation or not. I just was concerned that she had an opportunity to be alone quietly for a few minutes if she did want to make a notation. Approximately a minute and a half passed or so and she indicated to me that, uh, she had identified number two; absolutely, positively.

Q And she didn't say because of voice tone or hair color or anything? It was an obvious identification to you?

A To me it was.

Q Is it customary for you to not allow a representative of the Public Defender's Office to remain for the identification portion of the lineup?

A Well, I - say, customary for me - under the circumstances there were people pressing this lady and I wanted to make sure that she had a fair opportunity to make a notation on the piece of paper that was provided to her if she wanted to. Felt that was in everybody's best interest. I didn't want her to - to jump to any conclusions or to misidentify anybody or to too quickly be forced to - to write things down without having an opportunity to write something down if she wanted to.

Q Let me - let me word the questions this way. Prior to the Kirkley lineup had you at anytime asked a defense counsel or a representative of the Public Defender's Office or anyone else to leave prior to identification being made by a purported victim in a lineup procedure?

A Yes, sir; I did. I asked police officer - everybody that wanted to crowd into that room —

Q No, sir.

A — I asked them to get out.

Q My question was, any other lineups prior to Kirkley that you would have asked a representative of the defendant, whether it be reained counsel or a representative of the Public Defender's Office to leave before the lineup procedure and identification was completed?

A This was the first - the first lineup that I had attended as an assistant district attorney.

Q All righ, thank you, sir. I have no other questions.

CROSS-EXAMINATION

BY MR. ERWIN:

Q Well, how long have you been practicing law?

A September the 9th, 1971.

Q And are you familiar with the constitutional rights guaranteed defendants at lineups?

A Yes, sir.

Q And in your legal opinion that night were you conducting this lineup in accordance with those constitutional rights?

A Absolutely. I'm the one that called the Public Defender's Office. I called, uh, Mr. Leon Jackson, Public Defender. I had him called, I personally did not call him. I asked Lieutenant Jones to call him to make sure that Mrk Kirkley had an attorney present. We were instructed that it was inconvenient for Mr. Jackson so when I got to the sheriff's department I found out that Mr. Jackson was not going to be there I called Mr. Alton Moran. I personally called him.

Q Who is Alton Moran?

A He is - he is the Public Defender. I called him at his home

and told him that we were going to have a lineup, uh, I wanted to make sure that Mr. Kirkley had an attorney there because if he was an innocent man that we certainly didn't want to inconvenience him any longer than we had already inconvenienced him by having him arrested and so on and so forth.

Q The Public Defender's Office in fact send an attorney to this lineup?

A No, sir; Mr. Moran told me that, uh, uh, it was his procedure to have an investigator or - or some other employee attend the lineup and he said that he would have someone there.

Q At any point in that time - during the conducting of that lineup, did the representative from the Public Defender's Office complain to you that things weren't being done according to the Constitution?

A No, sir in fact at every step in - in selecting people in the lineup, in instructing the victim as to what was going to happen I made it a point to ask him if he was satisfied with - with my instructions or if he was satisfied with what had occurred and - and - on - on two occasions he told me, yes. He said he was very satisfied. I didn't ask him if he was satisfied when I asked everybody to get out of the room.

Q At any point in time that evening while you were conducting the lineup did you suggest to Ms. Miller that she had to pick someone in that lineup?

A Uh, no, sir.

Q Did you suggest to her that the defendant was in fact in the lineup?

A No, sir.

Q Did anyone in your presence ever do either one of those two things?

A No, sir.

Q And were you in Ms. Miller's presence the entire evening or the entire time the lineup was being conducted?

A From the time that she walked into the - the show-up room until the time that she had left the show-up room, made an identification I was - I was within sight in the room with her; yes, sir.

Q Are you familiar with the Louisiana law which states in effect that a defendant is entitled to counsel from the time the prosecution is run?

A I understand he is entitled to an attorney at any critical stage of proceedings against him.

Q Did you - did you —

MR. BARNES: The answer was better than the question.

BY MR. ERWIN:

Q Did you consider that a critical stage?

A That's why - yes, sir; that's why I called for Mr. Moran.

Q To ensure that the defendant's rights were protected?

A Well that was part of my concern. I was less concerned about Mr. Kirkley than - than I was about making sure that the lineup that the victim had an opportunity within the short period of time from the attack until the arrest to have an opportunity to view a suspect.

Q And in fact have an opportunity to collect her thoughts and put them down on paper when she was alone?

A That was my concern after the lineup was over.

Q That's all I have.

MR. BARNES: No other questions.

THE COURT: Y'all don't mind if I ask this witness a few questions, do you?

MR. BARNES: While you have him under oath, now's your chance, Judge.

THE COURT: I'm going to write them out and you can write them - you can answer them in writing. But they're not necessarily material to this case.

A All right.

THE COURT: I suppose you're going to send a bill to the judges to pay you a witness fee, huh, Mr. Weber?

A No, sir.

MR. BARNES: Your Honor, we're going to rest on that point. There is a Jackie Culotta out there but I don't think I need him under the circumstances.

THE COURT: Well, wait. You rest, Mr. —

MR. BARNES: Yes, sir.

THE COURT: You rest in rebuttal?

MR. ERWIN: I don't have any evidence, Your Honor.

THE COURT: All right, now, here's what I want you to to. I want you to get those bond forfeitures and go ahead and forfeit them. But in the meantime one of them showed up. Did you get your business straight with your client?

MR. BUCKLEY: Yes, Your Honor.

THE COURT: So don't forfeit that one since he showed up late. That's Carl Creighton. But you can forfeit the other if we got any other bond forfeitures.

COURT DEPUTY: All right, we've already taken care of them.

THE COURT: All right.

(REPORTER'S NOTE: At this time other matters on the court docket for this date, not relating to this case, were taken up and the hearing of this matter resumed as follows:)

THE COURT: All right, y'all ready to submit it huh?

MR. ERWIN: Well, I am, Your Honor. I - naturally if Mr. Barnes has any argument I'm going to argue too.

THE COURT: Well, I thought y'all already said y'all were going to submit it, but if y'all want to —

MR. BARNES: Your Honor, we're going to - the point I think in the thrust of the motion has already been pointed out to the Court and that is that the defendant's representative was asked to leave at a critical stage of the proceeding.

THE COURT: Comment by the State?

MR. ERWIN: Only that there was no critical point of the proceeding at that time. The lineup had been conducted, everything had been conducted according to law, Ms., uh, Miller was allowed at that time to go off by herself and write down who she picked out. State says that there's nothing unduly suggestive about that, uh, and submit it on that, Your Honor.

THE COURT: All right, I'm ready to rule if y'a'l ready. If you're not then I'll let each of you submit a brief, but otherwise I'm ready to rule.

MR. ERWIN: State's ready.

THE COURT: You ready?

MR. BARNES: We're ready.

THE COURT: Motion denied.

MR. BARNES: Thank you, Your Honor.

HEARING CLOSED

APPENDIX J

STATE OF LOUISIANA	**Number 3-84-388, Sec. II**
VERSUS	**19th Judicial District Court**
JAMES HENRY KIRKLEY	**Parish of East Baton Rouge**
	State of Louisiana

MOTION IN ARREST OF JUDGMENT

NOW INTO COURT, through undersigned counsel, comes and appears James Henry Kirkley, defendant herein, who, reserving all other rights that he may have in the premise and reserving all rights allowed to him under the Constitution and Laws of the United States and the Constitution and Laws of the State of Louisiana, moves this Honorable Court to arrest the judgment which results from his conviction by a jury on September 6, 1984 on the following grounds, to-wit:

1.

Defendant is charged with an offense which is not punishable under a valid statute; that he has been charged with aggravated rape pursuant to LSA-R.S. 14:42.

2.

Said statute is unreasonably vague and, therefore, void on its face and as applied in the following respects, to-wit:

A. The offense of aggravated rape charged under LSA-R.S. 14:42 is confusing, because the same elements can be found for conviction for forceable rape under 14:42.1; that both statutes require a finding of fact which is similar in nature, but results in sentences of such disparity that same result in a constitutional violation.

3.

Further, a reasonable juror could not possibly decipher the difference between aggravated rape, forcible rape and sexual battery as defined in Article 43.1 of the Louisiana Revised Statutes.

4.

Generally, all three offenses amount to the same offense, with a disparity in sentencing; that no reasonable juror could possibly determine the difference between the grades of the various offenses and thereby reach an equitable verdict.

5.

As a result thereof, the charge under such statute(s), is void for vagueness and a violation of the due process requirements of the Fifth Amendment and Fourteenth Amendment of the United States Constitution and Article I, Sections 2, 13 and 16, Louisiana Constitution, 1974.

6.

Further, the defendant has been convicted of aggravated rape and aggravated burglary; the defendant herewith submits that he cannot be found guilty of both offenses since the same constitute the same offense with elements necessary to convict for either being contained in both; therefore, the provisions of the United States Constitution and the Constitution of the State of Louisiana above cited have violated, together with Article I, Section 15 of the Constitution of the State of Louisiana.

7.

Therefore, the judgment rendered by virtue of the verdict returned on September 6, 1984 should be set aside and the

defendant should be dismissed from further obligation or alternatively granted a new trial.

WHEREFORE, MOVER PRAYS that the Motion in Arrest of Judgment herein filed be granted and that he be discharged from further obligation to said charges or alternatively granted a new trial.

MOVER FURTHER PRAYS that the State of Louisiana be directed, through the District Attorney in and for the Parish of East Baton Rouge, State of Louisiana, to appear contradictorily with the defendant and show cause, if any the State has or can, why the Motion in Arrest of Judgment herein filed should not be granted.

MOVER FURTHER PRAYS for all other orders and decrees necessary or proper in the premise which law, equity or the nature of the case may permit.

By Attorney:

Walton J. Barnes, II
A Professional Law Corporation
P. O. Box 596
Zachary, Louisiana 70791
(504) 654-0248

/s/ Walton J. Barnes, II

CERTIFICATE

I hereby certify that this Motion together with the requisite copies for the District Attorney and his staff have this day been filed with the Clerk of the Criminal Division in and for the Parish of East Baton Rouge. That the motion will be heard on the 20th day of September, 1984.

This 18th day of September, 1984.

/s/ Walton J. Barnes, II
Attorney for Defendant

STATE OF LOUISIANA	**Number 3-84-388, Sec. II**
VERSUS	**19th Judicial District Court**
	Parish of East Baton Rouge
JAMES HENRY KIRKLEY	**State of Louisiana**

ORDER

THE FOREGOING MOTION AND ALL OF THE PREMISES CONSIDERED:

IT IS ORDERED that the State of Louisiana appear and show cause contradictorily with the defendant why the Motion in Arrest of Judgment filed herein by the defendant should not be granted.

THUS DONE, READ AND SIGNED In Chambers at Baton Rouge, Louisiana on this 18th day of September, 1984.

/s/ Cleveland Marcel, Sr.
Judge, 19th Judicial District Court